UNIVERSITY OF ALBERTA

ENVIRONMENTAL IMPACT LITIGATION AND PUBLIC POLICY: COMPARING THE OLDMAN RIVER DAM CASE WITH THE AMERICAN EXPERIENCE

by

Michele A. Lewicki

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Arts.

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The undersigned certify that they have read and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled ENVIRONMENTAL IMPACT LITIGATION AND PUBLIC POLICY: COMPARING THE OLDMAN RIVER DAM CASE WITH THE AMERICAN EXPERIENCE submitted by Michele A. Lewicki in partial fulfilment of the requirements for the degree of MASTER OF ARTS.

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For Victor…

ABSTRACT

Traditionally, resolving policy conflicts in the legal forum was a political strategy that few Canadian interest groups employed. By the mid-1980's, however, largely in response to both the changes within the legal system and the influence of Charter cases, litigation became an important addition to interest group strategies as a means for placing issues on government policy agendas. One area in particular that has become prone to a heightened level of litigation is the field of environmental policy. The literature on environmental litigation in Canada suggests that by the late 1980's, environmentalists were drawn to the legal system to fight their policy battles.

This case study considers the effectiveness of this strategy by examining the Friends of the Oldman River Society's (FOR) success in achieving its policy objectives in the legal system. Specifically, this study is concerned with FOR's legal actions challenging the federal government's failure to apply environmental assessment guidelines to the Oldman River dam. The experience that environmentalists have had with EIA litigation in the United States is also reviewed to help offer some explanations regarding the boundaries of effectiveness of this strategy.

A review of the American literature reveals that environmentalists had mixed levels of success with litigation. For example, although the federal courts ruled in favour of environmental plaintiffs respecting the procedural requirements of environmental assessment legislation, legal challenges calling for expansive readings of the legislation were dismissed. In light of these consistent rulings, American environmentalists have increasingly adjusted their strategies to de-emphasize environmental assessment litigation.

The Oldman case demonstrates that Canadian environmentalists may experience similar limitations with environmental assessment litigation. In this case, although FOR was successful with legal actions respecting the procedural requirements of environmental assessment guidelines, the courts did not rule in favour of the Society in substantive cases primarily due to the non-binding nature of the guidelines. Recent changes to federal environmental assessment legislation did not address the flaws identified in the Oldman case. Thus, it may be argued that the new legislation limits the impact that litigation is likely to have on influencing environmental policy.

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LIST OF ABBREVIATIONS

AEC	Atomic Energy Commission
APA	Administrative Procedure Act
CEAA	Canadian Environmental Assessment Act
CEQ	Council on Environmental Quality
CPWS	Canadian Parks and Wilderness Society
CWF	Canadian Wildlife Federation
EAP	Environmental Assessment Panel
EARP	Environmental Assessment Review Process
ECA	Environmental Council of Alberta
EIA	Environmental Impact Assessment
EIS	Environmental Protection Agency
ESA	Endangered Species Act
FEARO	Federal Environmental Assessment Review Office
FOR	Friends of the Oldman River Society
ISC	Interagency Scientific Committee
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NPA	National Parks Act
NWPA	Navigable Waters Protect Act
ROD	Record of Decision
SAS	Seattle Audubon Society
SCRAP	Students Challenging Regulatory Agency Procedures
SEIS	Supplemental Environmental Impact Statement

I. THE EMERGENCE OF LITIGATION AS A POLITICAL STRATEGY

The pilgrimage to the courthouse has become a common journey for many of Canada's interest groups for, today, many have come to view litigation as a useful strategy to pursue policy goals. But while litigation now seems to be a widely used strategy among interest groups today, the attraction to Canada's fourth branch of government has not always been this strong. In fact, Knopff and Morton note that in the past Canadian interest groups rarely utilized the courts to achieve their public policy objectives, adding that, "there ha[d] been no Canadian parallel to the American interest group practice of extensive litigation of test cases supported by legal defense funds."[1] For the most part, the strategies that interest groups employed focused on other branches of government besides the judiciary. And since resolving policy conflicts in the legal forum was viewed as inappropriate in the eyes of the Canadian legal community,[2] the courts were not expected to play a significant role in determining public policy through judicial review.

To what may we attribute this shift from being historically indifferent toward the legal system to becoming, by the mid 1980's, one of the more litigious of the

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[1] Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in A. Cairns and C. Williams, eds. Constitutionalism, Citizenship and Society in Canada (Toronto: University of Toronto Press, 1985), 150.

[2] Ibid., 150.

industrialized and urbanized countries?[3] One explanation offered is that changes within the legal system contributed to increased access to the courts. Russell suggests that the expansion of the legal profession as well as an increase in legal aid programs brought the Canadian pattern closer to the American experience and these recent developments, "... made the option of taking disputes to court more available to people of limited means."[4] These developments, combined with a judiciary that expanded public interest standing, led to an increase in interest group activity in the legal forum. Others point to the introduction of the Charter to explain the expanding role of the judiciary in public policy conflicts. Since the Charter took effect in 1982, there has been a marked increase in the number of legal actions being initiated by interest groups who challenge Charter infringements. From groups opposing cruise missile testing like Operation Dismantle, to pro-life and pro-choice groups, many issue-oriented associations made their way to the courthouse door, abandoning the view that the judiciary ought not to become involved in policy conflicts. This activity in the legal forum led Knopff and Morton to suggest that litigation became an important addition to interest group strategies as a means for placing issues on government policy agendas.[5]

It would seem that the increase in utilizing the litigation strategy has carried over into other policy areas as well. In particular, the area of environmental policy has also become prone to a heightened level of litigation. This trend is acknowledged in recent

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[3] Peter Russell, The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson Limited, 1987), 32.

[4] Ibid., 32.

[5] Knopff and Morton, 151.

literature regarding the development of environmental litigation in Canada which suggests that environmental groups are using the courts more frequently now to attain policy goals than they did in the past. Tingley notes that prior to 1985, relatively few public interest environmental lawsuits reached court dockets,[6] but by 1988, the appeal of the courts grew as environmentalists were drawn to the legal system to fight their policy battles.[7] Tingley alerted the environmental policy community that this trend was not an aberration and one could expect such legal actions supporting environmental protection to continue to increase in volume in the years to come.[8] Her predictions have turned out to be quite accurate as one need not look too far to find examples where environmentalists have taken their policy battles to court. Such examples include the Canadian Wildlife Federation's legal challenge to halt construction of the Rafferty irrigation dam on the Souris River in Saskatchewan,[9] the Alberta Wilderness Association's attempt to void a forest management agreement between the Alberta government and Daishowa Canada,[10] and the Canadian Parks and Wilderness Society's successful challenge to halt clearcut

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[6] Donna Tingley, "Recent Developments in Public Interest Environmental Law" Presented at the Mid-Winter Meeting of the Alberta Branch of the Canadian Bar Association, Jan. 1990, 1.

[7] Donna Tingley, "Public Interest Groups: An Emerging Consideration in Corporate Planning" Western Canadian Environmental Law and Practice: Coming Clean on the Legal and Business Issues (Toronto: the Canadian Institute, 1988), 1.

[8] Ibid., 1.

[9] (1990) 24 A.C.W.S. (3d) 812.

[10] (1992) 87 D.L.R. (4th) 1

logging in Wood Buffalo National Park.[11]

This study is inspired by an interest in the use of the courts by such environmental groups as an avenue to pursue their policy goals. Also of interest is how American environmentalists have used litigation as a political strategy. Since the use of the courts has been much more common in the United States, and because litigation is a relatively new political strategy being used by Canadian environmentalists in comparison, examining the success rates of the more seasoned environmental litigants to the south will be a valuable exercise. Finally, the case which inspired the examination of this political strategy -- the legal battles surrounding the construction of the Oldman River Dam in southern Alberta -- will be the main focus of this study. This introductory chapter will provide an overview of the development of the American and Canadian environmental movements, introduce the reader to the Oldman River Dam controversy, present the aims of this study, and conclude by providing an overview of the following chapters.

A. The American Environmental Movement

Part of the early environmental movement in the U.S. grew out of a conglomeration of loosely organized voluntary associations connected with conservationism.[12] These associations were concerned primarily with getting the federal government to secure land areas to protect natural habitat, giving little consideration to sustenance issues. In the

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[11] (1992) 55 F.T.R. 286.

[12] Allan Schnaiberg, The Environment: From Surplus to Scarcity (New York: Oxford University Press, 1980), 368.

latter part of the 1960s, a new environmental movement started to develop in response to growing concerns regarding environmental degradation. During this time, a strong emphasis was placed on attempting to influence government decision-making by encouraging groups to become involved in participatory strategies such as lobbying and media campaigns.

Although this new environmental movement was comprised of diverse elements, Andrews asserts that there were two common factors among the various groups which acted as a binding force for the movement. First, virtually every group was opposed to a large scale transformation of the environment by powerful economic and government institutions. Second, these groups realized that government activities were a central part of the problem and not just the potential solution that conservationists had taken them to be.[13] Andrews suggests that these factors united a new coalition of political interests under a common set of general principles, political labels and tactics.

But, environmentalists had to come to grips with the fact that convincing government agencies to change their policies would be an extremely arduous task. They soon came to realize that they would face similar difficulties that other non-economic interest groups before them had encountered in the legislative and executive branches of government. It became evident that environmentalists likely would not enjoy the same access to the political forum that powerful business and labour organizations enjoyed.[14]

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[13] Richard Andrews, "Class Politics and Democratic Reform: Environmentalism and American Political Institutions" Natural Resources Journal Vol. 20 (1980), 232.

[14] Lettie Wenner, "Interest Group Litigation and Environmental Policy" Policy Studies Journal Vol 11 (1982/83, 671.

So, coincidental with the emergence of this new movement and after realizing that government agencies and institutions might hamper their policy objectives, environmental groups made a conscious decision to use the judicial arena to address the deterioration of their environment by development projects. Wenner notes that after recognizing the success that other economically powerless groups (the civil rights activists) had had in the courts in the 1960s, many environmental attorneys argued that the judicial branch offered the most promising forum for achieving policy goals.[15] For example, Joseph Sax, one of the earliest proponents of environmental litigation in the United States, argued that courts provided citizens with the means to influence government decision-makers by bringing important matters to legislative attention and by forcing officials to consider the impact of their proposals on the environment.[16]

But environmentalists were motivated by more than an interest in forcing environmental matters onto government agendas. These groups were also interested in ensuring that environmental legislation passed in the early 1970s was being enforced. Wenner notes that many of the environmentalists who initiated legal actions against government agencies were also the chief proponents of most of the environmental legislation under which these cases were litigated. These groups had lobbied legislators to include provisions for citizen participation in many of the laws so they had a large

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[15] Lettie Wenner, "The Courts and Environmental Policy" in James Lester (ed) Environmental Politics and Policy: Theories and Evidence (Durham: Duke University Press, 1989), 238.

[16] Joseph Sax, Defending the Environment (New York: Alfred E. Knopf, 1971), 114.

stake in seeing that the new laws were being used appropriately.[17] The judicial branch was viewed as a useful watchdog to force reluctant administrators to adhere to these laws. This new legislation gave those groups who were disappointed with past legislative or executive decisions the opportunity to attempt to influence environmental policy in the judicial arena.

The focus on the courts as an alternative point of access to the political process was made possible by a United States Supreme Court decision which loosened restrictions on the standing rule.[18] Since that time, courts have played an important role in helping to formulate, modify, and clarify environmental policy.

B. The Courts and the Canadian Environmental Movement

The origins of the environmental movement in Canada followed a similar pattern to that experienced in the United States. The movement formed during a time when outside attempts to influence government decision-makers competed with the prevailing assumption that environmental issues were the prerogative of government departments responsible for initiating economic development proposals.[19] But unlike their American counterparts, these organizations were not bound by common factors and their diverse interests prevented the movement from significantly influencing environmental policy for

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[17] Lettie Wenner, The Environmental Decade in Court (Bloomington: Indiana University Press, 1992), 44.

[18] Lettie Wenner, "Interest Group Litigation and Environmental Policy," 671.

[19] George Hoberg, "Representation and Governance in Canadian Environmental Policy" Paper Prepared for the Conference: "Governing Canada: Political Institutions and Public Policy" McMaster University, 25-26 Oct. 1991, 6.

two reasons. First, these associations often did not share similar viewpoints, making group mobilization under one common interest difficult to achieve. This had the effect of limiting the movement's ability to compete with the cohesive and structural power source of government and business.[20] Second, the movement was also economically powerless and the small operating budgets of these organizations were no match for the monetary resources enjoyed by their corporate opponents.[21] Thus, the lack of these resources prevented environmentalists from effectively participating in environmental decision-making.

Unable to break into the environmental policy community, environmentalists made their appeals to the public. In his study on environmental lobby groups, Wilson found that environmentalists focused primarily on trying to sway the general public, engaging in campaigns that placed a greater emphasis on mobilizing public opinion in the hope that this pressure would eventually influence government policy-making.[22] But while environmentalists have broken some ground by mobilizing public opinion, Wilson notes that this gain has translated into only patchy policy advances. He also adds that: "The record of successes and failures reminds us that the movement's feistiness and resourcefulness have often not been sufficient to push aside the obstacles it faces."[23] He

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[20] Ibid., 7.

[21] Jeremy Wilson, "Green Lobbies: Pressure Groups and Environmental Policy" in Robert Boardman (ed.) Canadian Environmental Policy: Ecosystems, Politics, and Process (Toronto: Oxford University Press, 1992), 113.

[22] Ibid., 115.

[23] Ibid., 124.

explains that the corporate-government alliance, by controlling access to the environmental policy community, prevents interest groups from challenging adequately government decisions respecting proposed developments regardless of whether or not public opinion supports environmentally sound initiatives.[24]

Faced with their inability to compel governments to make stronger commitments to environmental protection through direct lobbying strategies, many Canadian environmental organizations have turned to litigation in an attempt to attain their policy goals. In reaction to the limitations placed on public participation, individuals and groups have utilized the judicial forum to try to break into the environmental policy community, calling to question the closed nature of government decision-making.

Tingley asserts that the inadequacy of existing regulation to review proposed development projects was the main motivation behind many environmentalists' decisions to use litigation as a strategy for influencing environmental decision-making.[25] She aptly describes the plight that environmentalists have endured:

> "Formal submissions had been made; meetings held with Ministers and bureaucrats; coalitions formed; political campaigns mounted; but to no avail! Ultimately [public interest groups] were frustrated by their inability to present their views and to have their perspectives taken into account by the decision-makers. So, they went to court."[26]

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[24] Ibid., 110.

[25] Donna Tingley, "Public Interest Groups: An Emerging Consideration in Corporate Planning," 10.

[26] Ibid., I-3.

In his discussion on why some groups are attracted to the courts, Mandel suggests that the David and Goliath scenario may be the main drawing force to the legal forum.[27] He purports that it is the form of legal discourse -- judicial independence and impartiality -- that attracts powerless interests to the legal system. He also suggests that interest groups believe that:

> "...with enough ingenuity, preparation and so on, important political victories can be won in the courts that cannot be won in the more familiar political arenas... [and since] most lawyers can make almost any political case, no matter how weak, sound like a strong legal case ... [litigation] is very hard to resist..."[28]

So while some may argue that litigation is not the political strategy of choice among many environmentalists in Canada,[29] environmental associations are using the legal system now more than ever before. Webb, for example, asserts that there has been a noticeable increase in citizen launched court actions which have been used in an attempt to participate in government environment decision-making.[30] Hoberg also notes that despite efforts by Canadian policy-makers to de-emphasize legalism as observed in the

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[27] Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall & Thompson Inc., 1989), 64.

[28] Ibid

[29] Michael Howlett, "The Judicialization of Canadian Environmental Policy 1980 - 1990: A Test of the Canada-U.S. Convergence Thesis" Paper Presented to the Annual Meeting of the Canadian Political Science Association, Charlottetown, PEI, June 2, 1992.

[30] Kernaghan Webb, "Between Rocks and Hard Places: Bureaucrats, Law, and Pollution Control" in Robert Paehlke and Douglas Torgerson (eds.) Managing Leviathan: Environmental Politics and the Administrative State (Peterborough: Broadview Press, 1990), 218.

United States, environmental groups now seem much more attracted to the litigation strategy used frequently by their American counterparts. He also suggests that two recent Canadian cases in which groups initiated legal actions to block the construction of dams are examples of this increased desire to use the courts.[31] This chapter will now turn to a discussion on one of these cases.

C. The Oldman River Dam Controversy

Of the two cases that Hoberg refers to above,[32] the legal challenges initiated by the Friends of the Oldman River Society (FOR) are of primary interest here. The development project in question, an Alberta government undertaking, has been constructed on the Oldman River north of the town of Pincher Creek in the southwestern part of the province. From its initial phases to the project's completion, the provincial government's decision to build a dam at this location has been criticized by environmentalists who questioned the necessity of onstream storage on the Oldman River. Following is a discussion of the key issues that unfolded in this controversy from the project's conception to FOR's decision to use litigation as a political strategy.

Plans to build a dam in southern Alberta date back to the early 1970's. It has been argued elsewhere that Peter Lougheed, then Premier of a young Conservative government, announced his plans to spend $200 million on irrigation projects prior to

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[31] George Hoberg, "Sleeping with an Elephant: The American Influence on Canadian Environmental Regulation" Journal of Public Policy vol. 11(1) (1991), 125.

[32] The other case was the Rafferty case in Saskatchewan. See *Canadian Wildlife Federation Inc v. Canada* (1990) 24 A.C.W.S. (3d) 812.

calling the 1975 provincial election. The intent behind the announcement was to capture voter support from the Social Credit party stronghold in that area.[33]

Preliminary studies on water use in the Oldman River Basin were already underway by the time the ballots were counted in March, 1975.[34] In June 1974, Alberta Environment appointed an advisory committee headed by the Department's Deputy Minister (DM), Assistant Deputy Minister (ADM), and the Director of the Planning Division.[35] The committee identified nine potential flow regulation reservoirs and preliminary assessments were conducted to determine the total water storage and estimated project cost of each site. These estimates eliminated five of the possibilities, and of the four remaining, the committee concluded that the Three Rivers site was,

> "...the most suitable site for onstream storage development, mainly because of its ability to meet the needs of the major demand points at the lowest cost."[36]

The remaining sites were ruled out because two were located on Indian reserves (Belly River and Brocket) hence outside provincial jurisdiction, and the Fort Macleod site was

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[33] Laura-Marie Berg, "The Oldman River Dam and Environmental Politics in Alberta" Honours Thesis (Edmonton: University of Alberta, 1989), 16.

[34] The Conservatives won a landside victory, capturing 69 of the 75 available seats. See Rand Dyck, Provincial Politics in Canada (Scarborough: Prentice-Hall, 1991), 515.

[35] Berg notes that each of these men had been involved in developing water diversion projects in Alberta before being appointed to the new Environment Ministry. She argues that due to their earlier positions, they were particularly keen in seeing this proposal begin.

[36] Alberta Environment, Oldman River Flow Regulation: Preliminary Planning Studies, Summary Report (Edmonton: Planning Division, 1976), 3.

estimated to be more expensive and unable to hold the same volume of water as Three Rivers.

With the release of its report in June 1976, the committee recommended that Phase II studies commence immediately with a detailed examination of the impact of the Three Rivers site. The committee suggested that these studies be completed by 1978 in order to get the project underway to meet the urgent demand of water supply in the area. The report also recommended that Phase II consider public reaction to the 1976 study.[37]

Over 80 responses to the 1976 study were submitted by the public. But these responses could not have been what the Phase I committee had anticipated as their recommendation to assess only one site was dropped from the terms of reference for Phase II. After reviewing the first study and the subsequent public response to it, the Phase II committee established new objectives for assessing water use in southern Alberta, including a reevaluation of the nine sites that had been identified earlier.[38]

The Phase II committee released its report in August, 1978. Among its recommendations, the committee suggested the following: first, that existing irrigation works be upgraded to achieve more efficient use of the water supply;[39] second, that offstream water storage sites also be developed to increase water use efficiency;[40] and

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[37] Ibid., 5.

[38] Oldman River Basin Study Management Committee, Oldman River Basin -Phase II Studies: Report and Recommendations (Edmonton: Management Committee, 1978), 2.

[39] Ibid., 59.

[40] Ibid., 60.

third, that an onstream flow regulation reservoir be developed.[41] The committee also recommended that the Alberta government not make the final site selection for a dam (the choice had been narrowed down to Three Rivers and Brocket) until after an advisory committee had an opportunity to hold public hearings and complete its report.[42]

Interestingly, unlike the Phase I study, the committee did not endorse one site over the other but instead preferred to leave that decision to the provincial government. Why the committee chose this position was likely due to a statement included in an appendix of the Phase II report written by committee member Hilton Pharis, a rancher in the Crowsnest Pass area. He suggested that it would be premature to choose a final site before area residents had an opportunity to consider the social and environmental disruptions that would result with a project of such magnitude. He also asserted that further discussion with the Peigan Indian Band regarding the impact of a dam was needed especially since one of the two potential sites under consideration was located on the Indian Reserve.[43]

While the flavour of the recommendations in this report were certainly different from those of the Phase I committee, Phase II had still narrowed the choice to two locations. Since the 1976 report indicated a reluctance on the part of the Alberta government to choose the Brocket site due to jurisdictional complications, it seemed only a matter of time before the Three Rivers site was approved. But one obstacle remained

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[41] Ibid., 61.

[42] Ibid.

[43] Ibid., 75.

in the way of the final selection. The government would first have to contend with the Environment Council of Alberta's (ECA) report on water management in the Oldman River Basin.

The ECA's 1979 report may best be described as a thorn in the side of the Alberta government because while only advisory in nature, the report acted as a catalyst in mobilizing opposition to onstream storage on the Oldman River. The Council rejected Alberta Environment's development proposal because it:

> "... [did] not believe that an onstream dam [was] required to provide for the development of irrigation to its maximum economic potential in the basin."[44]

Instead, the Council agreed with the Phase II committee's first two recommendations - improving existing water delivery systems and developing offstream reservoirs - in order to meet the water supply demand in southern Alberta.[45]

Alberta disagreed with the ECA's recommendations regarding onstream storage. In 1984, the government announced that it would proceed with the construction of a dam at the Three Rivers site.[46] Opposition to this decision grew as those who had made submissions earlier at the ECA public hearings once again argued that the dam would have a negative impact on the environment. These opponents demanded that a thorough

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[44] Environment Council of Alberta, Public Hearings on Management of Water Resources Within the Oldman River Basin:Report and Recommendations (Edmonton: Environment Council of Alberta, 1979), 145.

[45] Ibid., 95.

[46] "Oldman River Dam Project" Calgary Herald 14 Mar. 1990.

public environmental impact assessment (EIA) be completed before construction was approved.[47]

In the midst of this opposition, the provincial government went ahead with plans for the dam, applying to both provincial and federal departments for the necessary water licence and construction permits. On March 18, 1985, Alberta Environment applied for exploration and construction permits from a division of its own department as required by the Alberta Water Resources Act.[48] The exploration permit was issued the following day and a temporary construction licence was granted in August 1987. At this time, Alberta Environment also obtained a construction permit from the federal Minister of Transport, a requirement of the federal Navigable Waters Protection Act.[49] The granting of these permits would later become the subject of a series of legal actions.

At approximately the same time that Alberta Environment received its construction permits, many of the dam's opponents joined together under one organization. In August 1987, the Friends of the Oldman River (FOR) were incorporated as a society with a membership of more than 300 individuals and organizations.[50] The members agreed that FOR's main goal was to stop the construction of the dam. They also agreed that the means to achieve this goal would be to force the provincial government to conduct a full

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[47] Donna Tingley, "Tackling the Monolith: Oldman River Legal Actions" Law Now June/July 1989, 15.

[48] Jonathan Scarth, "The Oldman Dam Decisions" Resources No. 22 (Spring 1988), 4.

[49] P.S. Elder, "One More Look at Oldman Dam" Resources No. 39 (Summer 1992), 6.

[50] Donna Tingley, "Tackling the Monolith," 15.

scale public environmental review of the project. FOR was convinced that after such a review was completed, the provincial government would drop the project for environmental reasons.[51]

The adage "looking through rose coloured glasses" aptly describes FOR's above convictions because the Alberta government had no intention of dropping the project. As determined as FOR was to stop the dam, the provincial government was equally determined to ensure that the project continued. The government's rejection of the ECA's recommendations in addition to applying for construction permits indicated that Alberta would not abandon the project for environmental reasons alone.

At any rate, FOR's resolve was strong. The organization developed an action plan soon after being incorporated, employing several political strategies simultaneously to try to stop construction. These strategies included lobbying politicians at all levels of government, establishing a high profile in the media, and pursuing legal challenges. Martha Kostuch, Vice-President of FOR, asserts that the Society did not rely completely on one strategy at any given time. Rather, she states that every action was viewed as how it would contribute to achieving FOR's main goal. Kostuch adds that while the courts are viewed as a last resort by many people, litigation was not considered as such by her organization. Instead, legal actions were included in the early stages of FOR's action plan.[52]

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[51] Ibid.

[52] Martha Kostuch, "The Role of Lawyers in the Environmental Movement" Faculty of Law, University of Alberta. 4 Mar. 1992.

FOR initiated its first legal action against the construction of the dam in December 1987. This initiative challenged the validity of the interim construction license issued by the Water Resources division of Alberta Environment to commence the preliminary stages of the project.[53] Kostuch, upon reviewing the licence documents, discovered that Water Resources neglected to advise the public about the application prior to granting the construction permit.[54] FOR successfully challenged the licence application in the Alberta Court of Queen's Bench. Justice Moore quashed the licences and ordered the provincial government to comply with all the necessary requirements of the Water Resources Act.[55]

But while FOR celebrated its first legal victory, the ruling generally did little to help the Society achieve its main goal. Nowhere in the ruling was it ordered that construction be halted or that an environmental assessment be conducted. Rather, the judicial decision simply required that the provincial government comply with the statutory requirements of the Act. So the search began for the appropriate legal challenge, one that would force the government to conduct a full scale public environmental review of the project.

After a series of unsuccessful court challenges, this search brought FOR to the Federal Court of Canada (Trial Division) on April 21, 1989 when the Society initiated a legal challenge against both the federal Minister of Transport and the Minister of

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[53] *Friends of the Oldman River Society v. Minister of the Environment of Alberta* (1987) 2 C.E.L.R (N.S.) 234.

[54] Section 16 of the Alberta Water Resources Act (R.S.A. 1980, c. W-5) requires that public notice be given for all licence applications.

[55] *Friends of the Oldman River Society v. Alberta* (1987), 244.

Fisheries and Oceans.[56] The action challenged the Transport Minister's approval of a construction permit in 1987 without subjecting the project to an environmental screening. But, in this case, FOR went one step further and asked the court to order the federal ministers to comply with the Environmental Assessment and Review Process Guidelines Order (EARP) by appointing a panel to review the project.

FOR lost this case but eventually won the subsequent appeals to the higher courts. On March 13, 1990, the Federal Court of Appeal overturned the Trial Division's ruling, quashed the license and ordered the federal ministers to comply with EARP.[57] The Supreme Court of Canada later reaffirmed this decision.[58] It appeared as though FOR was well on the way to achieving its goal after a federal environmental panel was appointed to review the Oldman dam. We return to the Oldman story and a detailed discussion of the Federal Court decision and the subsequent Supreme Court appeal in chapter three. The chapter will now turn to a discussion on the aim of this study.

D. Examining Legal Victories in the Context of Achieving Policy Goals

This study focuses on an examination of FOR's success in achieving its policy objectives by using litigation as a political strategy. For the purpose of this study, success is defined in terms of whether or not FOR accomplished what it wanted in the legal system: first, getting an environmental impact assessment conducted on the project and

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[56] *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1990] 1 F.C. 248.

[57] *Friends of the Oldman River v. Canada* [1990] 2 F.C. 8.

[58] *Friends of the Oldman River Society v. Canada* [1992] 1 C.S.C.R. 3.

second, stopping the construction of the dam. While FOR was involved in numerous legal challenges regarding the Oldman dam, the combination of the Federal Court and Supreme Court cases and the subsequent events that resulted from them are of particular interest to this study. These cases warrant further discussion because they addressed the issue of whether EARP applied to the Oldman dam after the Society had launched numerous legal challenges that failed to produce this desired goal. This study is thus concerned primarily with FOR's EIA litigation which refers to those legal actions that challenged the federal government's negligence in conducting an environmental assessment of the project.

Because there are few Canadian cases with which to compare FOR's level of success in the legal forum, the advances that environmentalists have made by utilizing EIA litigation in the United States is also of particular interest to this study. An examination of the American experience may offer explanations regarding the boundaries of effectiveness that we may expect from EIA litigation in Canada. While the Oldman litigation demonstrates that environmentalists are successful in the legal forum, this study wishes to examine whether legal victories result in achieving desired policy outcomes. In assessing these victories, a distinction will be made between the degree of success achieved through judicial review of procedural and substantive legislation. The former legislation requires an agency to comply with the general directives of a statute, whereas the latter has more specific provisions that govern agency actions.

E. Overview

Chapter two begins with a discussion of the National Environmental Policy Act (NEPA) and an examination of its Environmental Impact Statement (EIS) requirement, the section of the Act which accounted for more legal challenges than any other part of the legislation. The chapter then turns to a review of the standing rule and the cases that were responsible for opening the legal system to environmental litigation. The chapter follows with an examination of several NEPA cases and considers whether environmentalists were successful in achieving their policy objectives through EIS litigation. The chapter continues by comparing NEPA to the National Forest Management Act (NFMA) to examine the difference between procedural and substantive legal actions and concludes with some thoughts regarding the utility of NEPA litigation.

Before returning to the Oldman story, chapter three will review Canada's environmental assessment guidelines in effect at the time FOR's battle began in the courts. A discussion of Canada's standing law follows and briefly considers the law's impact on the Oldman case. The chapter then examines the Federal Court and Supreme Court cases which subsequently led to the federal government's decision to appoint an environmental review panel to assess the Oldman dam. Following this, the chapter reviews the assessment panel's findings and examines this in the context of FOR's success in achieving its policy objectives. A comparison will be made between the Oldman litigation and the Canadian Parks and Wilderness Society's legal action regarding Wood Buffalo National Park. The chapter concludes by examining whether FOR accomplished all that it could given the legislation in place at the time of the Oldman conflict.

Chapter four reviews the legislative changes to EIA that occurred at the federal level of government following the Oldman litigation. The chapter considers whether the Oldman case contributed to changes to environmental assessment legislation in Canada. The chapter discusses these changes and concludes with some thoughts about what may be expected from the next generation of EIA litigation.

II. JUDICIAL REVIEW AND ENVIRONMENTAL POLICY: THE AMERICAN EXPERIENCE

> "Canada has always been preoccupied with how it is affected by its neighbour to the south, from the push for Confederation in 1867 to the free trade debate in 1988."[59]

It should come as no surprise that Canadians have more than a passing interest in what takes place south of the border. The influence that the United States wields internationally is certainly reason enough for a small, neighbouring country to be attentive. We depend on our neighbours for matters of national defense and our nation's livelihood is certainly affected by the impact that the U.S. has on our economy for being Canada's largest trading partner. Our interests in the U.S., however, encompass far more than policies regarding defense and trade. The American experience also significantly influences the manner in which Canadian decision-makers develop domestic policy.

Hoberg suggests that our decision-makers often borrow or emulate U.S. policy innovations.[60] He asserts that the American influence on many of Canada's environmental policies is pervasive -- legislation respecting environmental impact assessment (EIA) is no exception. In fact, when developing its EIA policies, Hoberg notes that the federal Department of Environment was particularly interested in the content of the U.S. National Environmental Policy Act (NEPA). Following the passage

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[59] George Hoberg, "Sleeping With an Elephant: The American Influence on Canadian Environmental Regulation" Journal of Public Policy II(1), 108 (1991).

[60] Ibid., 109.

of NEPA, noting the increasing acceptance of EIA as a decision-making tool, several Canadian officials, business leaders, and citizen groups took notice of the statute's possibilities.[61]

Canada's policy-makers, however, are not alone in their preoccupation with American trends. In his analysis of citations in Supreme Court decisions, Manfredi asserts that the Canadian judiciary has also observed happenings in the U.S. with great interest.[62] He found that American case citations began appearing in Supreme Court decisions in significant numbers during the 1970's and increased substantially following the enactment of the Charter.[63] This use of U.S. citations, Manfredi suggests, is an indicator of the influence that American jurisprudence has on the development of Canadian legal doctrine, particularly in the area of constitutional law.[64]

But we must not overlook the fact that the Supreme Court has cited U.S. cases in decisions besides those relating to Charter issues. Manfredi's data also reveal that from 1984 to 1988, 200 of the 385 American cases cited in Supreme Court decisions appeared in non-Charter cases.[65] Thus, the potential does exist for American jurisprudence to influence other areas of Canadian law, and environmental impact assessment law does not

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[61] Ibid., 124.

[62] Christopher Manfredi, "The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms" Canadian Journal of Political Science Vol. 23:3 (1990), 499.

[63] Ibid., 505.

[64] Ibid., 507.

[65] Ibid., 506.

escape this influence. That the Supreme Court cited an American case respecting NEPA in its first decision dealing with Canada's EIA guidelines suggests that this influence certainly is evident.[66]

So, it is with more than a passing interest that this study includes an evaluation of judicial review of U.S. environmental policy. When we consider that American practices influence both those who develop and interpret our country's policies, examining our neighbour's experience with NEPA litigation enables us to understand, to a certain extent, the development and utility of EIA litigation in Canada. Thus, with these influences in mind this chapter will do the following: discuss NEPA and its EIS requirement, review the liberalization of standing as it pertains to environmental litigation, examine the federal courts' responses to NEPA litigation, evaluate the accomplishments and shortcomings of NEPA litigation, compare the success of NEPA litigation to legal actions initiated under the National Forest Management Act, and conclude with an evaluation of the boundaries of effectiveness of NEPA litigation.

A. Environmental Impact Assessment in the U.S.

The environmental movement in the United States played an important role in encouraging legislators to pass some of the most powerful environmental statutes seen in North America in the early 1970s. One statute in particular, the National Environmental

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[66] See *Friends of the Oldman River Society v. Canada* [1992] 1 C.S.C.R.3. The American case cited was *Environmental Defense Fund, Inc. v. Mathews*, 410 F.Supp 336 (D.D.C. 1976).

Policy Act (NEPA), has been described as the single most significant environmental statute in the United States.[67]

The passage of NEPA was pivotal to the emerging view of protecting the environment. Not only was it considered an important symbol in binding the diverse elements of the environmental movement in the late 1960s,[68] it was also a congressional response to the realization that federal agencies were often responsible for making decisions which adversely affected the environment.[69] In light of this realization, NEPA set up parameters for carefully reviewing agency decisions before projects were given the authority to proceed. In doing this, NEPA established that environmental factors played an important role in agency decision-making, forcing the government to act more responsibly towards the natural environment.[70]

Why environmentalists had great expectations for NEPA immediately becomes apparent while reading the first section of the statute. Arguably a far-reaching statement, the purpose of NEPA is:

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[67] Joseph Sax, "Environmental Law: The U.S. Experience" in C.G. Morley (ed) Canada's Environment: The Law on Trial (Winnipeg: The Agassiz Centre for Water Studies, 1973), 172.

[68] Richard Andrews, "Class Politics and Democratic Reform: Environmentalism and American Political Institutions" Natural Resources Journal vol. 20 (1980), 232.

[69] Marion Miller, "NEPA and Judicial Oversight After Robertson v. Methow Valley Citizens Council and Marsh v. Oregon Natural Resources Council" Ecology Law Quarterly Vol 18 (1991), 223.

[70] Wenner, Environmental Decade in Court 10; Harold Leventhal, "Environmental Decision-Making and the Role of the Courts" University of Pennsylvania Law Report vol. 122 (1974), 515.

> "...to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."[71]

NEPA is comprised of two main parts. Title I contains a declaration and a mandate to the federal government and Title II establishes the office of the Council on Environmental Quality (CEQ).

Title I begins with what some authors have referred to as the substance of NEPA.[72] In section 101 Congress directs the federal government to consider the environmental impact of its actions in order to, "...create and maintain conditions under which man and nature can exist in productive harmony..."[73] This section also asks that the federal government,

> "...fulfil responsibilities of each generation as trustee of the environment for succeeding generations; assure...safe, healthful, productive, and aesthetically and culturally pleasing surroundings; attain the widest range of beneficial uses of the environment without degradation; achieve a balance between population and resource use..."[74]

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[71] 42 U.S.C. 4321.

[72] See Nicholas C. Yost, "NEPA's Promise - Partially Fulfilled" 20 Environmental Law 549.

[73] 42 U.S.C. 4331.

[74] Ibid.

The next section in Title I outlines the procedures that agencies must follow while pursuing their policy objectives. Fogleman asserts that this part of NEPA has two major aims. First, it places an obligation on an agency to consider the environmental impact of a proposed action. Second, it directs an agency to inform the public that it has indeed considered environmental concerns in its decision-making process.[75] The environmental impact statement (EIS) -- the so called "action forcing" element of NEPA -- in section 102 is the primary mechanism used to achieve these aims. The Act directs a federal agency pursuing a proposal which "significantly affect[s] the quality of the human environment"[76] to include a detailed statement about the environmental impact of that proposal in its report or recommendation.

Section 102(2)(c) outlines the information that must be addressed in the EIS. This includes a statement on the environmental impact of the proposal, adverse effects which cannot be avoided if the proposal is approved, alternatives to the proposed action, the relationship between local short-term use of the environment and the maintenance and enhancement of long term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action if approved.[77] NEPA also provides the public and other federal agencies with the opportunity to comment on the EIS report. The statute instructs agencies to address the

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[75] Valerie M. Fogleman, Guide to the National Environmental Policy Act (New York: Quorum Books, 1990), 111.

[76] 42 U.S.C. 4332.

[77] Ibid.

concerns voiced by citizens in its final report before the project may proceed.[78]

The above information is found within NEPA itself. But since its passage, the EIS process has grown to include more than just the requirements that were written in the statute in 1969. Prior to changes to NEPA, the implementation of the statute was left largely to the discretion of the federal agencies. This discretion lacked uniformity among the agencies as varying NEPA procedures were used.[79] As a result, new regulations were developed to provide uniform procedures that were binding on all federal agencies.

Authorized by an executive order,[80] the regulations require an agency to publish its intent to prepare an EIS in the Federal Register signalling the beginning of the EIS process,[81] publish the availability of draft and final EIS's in the Federal Register,[82] prepare supplemental EIS's for proposed actions as required,[83] and finally, after issuing its final EIS, publish a record of decision (ROD) in the Federal Register explaining why the decision-maker made his determination in choosing one alternative over another.[84]

The second part of NEPA establishes the Council on Environmental Quality (CEQ) within the Executive Office of the President. While the CEQ's primary

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[78] Ibid.

[79] Fogleman, 34.

[80] President Carter authorized the CEQ to make regulations for the EIS process through Executive Order 11,991 in 1977. See Fogleman, 31-33.

[81] 40 C.F.R. s. 1501.7 (1989).

[82] Ibid., s. 1502.9.

[83] Ibid., s. 1502.9(c).

[84] Ibid., s. 1505.2.

responsibility is to assist and advise the president on matters relating to NEPA, its other duties include analysing and developing national and international environmental policy, coordinating interagency environmental quality programs, and collecting and assessing environmental data.[85] The CEQ also reviews agency EIS's, the purpose of which is to bring environmentally unacceptable proposals to the President's attention who in turn decides whether or not to do something about them.[86] Finally, though not specifically within its mandate, the CEQ was also granted the authority, through executive orders, to develop the NEPA regulations discussed above.

The Environmental Protection Agency (EPA), while neither created by nor mentioned in NEPA, is also responsible for enforcing the statute. The EPA gets its authority from section 309 of the Clean Air Act.[87] This section was included in the Act to increase compliance with NEPA in the face of widespread agency resistance to the statute in the early 1970's. The EPA has administrative and review responsibilities with regards to the EIS process. Under the first, the EPA receives draft and final EIS's from agencies, publishes their availability in the Federal Register, provides an official log of EIS's filed, and ensures that filed EIS's are publicly announced. Under the second responsibility, the agency reviews and comments publicly on the environmental impact

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[85] 42 U.S.C. 4344.

[86] The CEQ does not have the authority to reject an inadequate EIS nor stop an environmentally unacceptable project. Those decisions are left up to executive branch. See Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Law (Stanford, CA: Stanford University Press, 1984), 170-73.

[87] 42 U.S.C. 7609.

of proposed actions.[88]

B. Getting Past the Courthouse Door - The Standing Rule

We recall from chapter one that American environmentalists were motivated to use the legal system primarily because they were frustrated by their inability to influence policy-makers in the political forum and they wanted to ensure that existing environmental legislation was being adequately enforced. But making a conscious decision to litigate does not automatically lead to a day in court. An organization that wants to pursue a legal action must first prove that it has a direct interest in a particular case. In other words, that group must prove standing to sue. Simply stated, the purpose of standing is to determine whether each party in a legal dispute has a legitimate stake in an issue. Standing was originally designed to allow only those individuals who had suffered a direct legal injury to apply to the courts for compensation. But interest groups were given the opportunity to sue other parties due to a liberalized judicial interpretation of this rule.[89] The former reading of standing has been relaxed to such an extent that:

> "...any interest group that can assert even the smallest and most indirect potential injury may claim a right to appear before the [government] agency and then seek review in the courts, in short, may claim access to the decision-making process of government."[90]

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[88] Fogleman, 41-42.

[89] Karen Orren, "Standing to Sue: Interest Group Conflict in the Federal Courts" American Political Science Review vol 70 (1976), 724.

[90] Martin Shapiro, "On Predicting the Future of Administrative Law" Regulation May/June 1982, 20-21.

By relaxing standing, the courts opened up the judicial arena to concerned citizens who had been unable to influence decision-making at other levels of government.

The changes to standing were particularly encouraging for environmentalists because, prior to the early 1970's, advancing environmental interests through the courts had been restricted. But in 1972, the United States Supreme Court established in *Sierra Club v. Morton* that environmental interests had a right to pursue their grievances in the legal system.[91] This case involved a decision by the U.S. Forest Service which approved a plan by Walt Disney Enterprises to build a ski resort in Mineral King Valley. The Sierra Club challenged this action on the grounds that the Forest Service had violated several federal statutes in the process of approving the permit. The group based its lawsuit on its status as a public interest group with an interest in the preservation of the environment. The Court refused to grant the Sierra Club standing on the basis that its allegation of interest to preserve the environment was too broad. However, the Court did suggest that a specific interest such as the inability of the organization's members to hike through an unspoiled wilderness if the project were to go ahead was sufficient to allow standing.

A second decision delivered by the Supreme Court demonstrated how easily the requirements for standing outlined in *Sierra Club v. Morton* could be satisfied. In *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP),[92] an unincorporated organization of students formed to challenge a proposal to increase a railroad surcharge. SCRAP argued that the existing rate unfairly discriminated against the

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[91] (1972) 405 U.S. 727.

[92] (1973) 412 US 669.

use of recycled goods and a further increase in the surcharge would continue to limit the use of recyclables thereby potentially causing an increase in the depletion of natural resources perhaps even in the area where the plaintiffs lived. The plaintiffs claimed that they had standing in this case because the surcharge would limit their enjoyment of local parks if mining and logging in those areas were to occur. Despite the convoluted and tenuous argument made by SCRAP, the Supreme Court held that they did have standing to challenge the proposal.[93] This case clarified that standing is not to be denied simply because many suffer the same injury and that the test for standing is qualitative, which means the magnitude of the alleged injury makes no difference so long as some proven injury exists.[94]

Several authors have considered why the Supreme Court has taken a liberal view on standing, particularly in the area of environmental law. For example, Findlay and Farber suggest that courts were initially receptive to environmental cases simply because they were similar to the kinds of injuries that courts have traditionally dealt with in the judicial arena. Environmental litigation generally asks the Court to provide a ruling on some federal statute rather than seek judicial intervention on the basis of the Constitution. In short, the Court is merely being asked to apply a norm created by Congress and an environmental lawsuit simply asks the courts to consider litigation that is familiar to

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[93] Roger Findlay and Daniel Farber, Environmental Law in a Nutshell (St. Paul, Minnesota: West Publishing Co., 1983), 5-6.

[94] Ibid., 6.

them.[95] Thus, encouraged by this liberal interpretation, environmentalists went to court to challenge proposals that adversely affected the environment.

C. NEPA in the Federal Courts - The EIS Under Judicial Scrutiny

Students of environmental policy have often commented that it is surprising NEPA became the central focus for litigation at the beginning of the environmental decade. Unlike much of the legislation passed after 1970, there were no explicit provisions in this statute addressing the scope of judicial review nor were there many provisions allowing for citizen participation. Thomas O. McGarity, however, points out that the passage of NEPA coincided with two other developments in administrative law which subsequently encouraged NEPA litigation. First, as discussed above, the courts were expanding the classes of persons who could challenge environmentally devastating government actions through the liberalization of standing. Second, the United States Supreme Court interpreted the Administrative Procedure Act (APA) to provide a vehicle for reviewing management decisions of the federal government. Formerly limited to regulated private parties, the Supreme Court decision[96] opened up the judicial forum to ordinary citizens who were concerned that the government was abusing its discretion in managing the nation's resources.[97] These developments subsequently opened the floodgates to NEPA actions which began to pour into the federal courts in the early 1970's.

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[95] Ibid., 8-9.

[96] See *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402 (1971).

[97] Thomas O. McGarity, "Judicial Enforcement of NEPA-Inspired Promises" 20 Environmental Law (1990), 570.

The flood of NEPA cases first entered the district courts, the lowest level in the federal judicial hierarchy. Many of the early cases at this level dealt with the enforcement of NEPA's procedures, particularly the EIS. In these cases, the courts came down hard on agencies who neglected to comply with the procedural requirements of the statute. For example, in *Harrisburg Coalition Against Ruining the Environment v. Volpe*,[98] the court ruled that the Department of Transportation erred in failing to prepare an EIS. In this case the Secretary of Transportation tried to use a departmental determination[99] as the EIS for a proposed interstate highway. The court held that the department's version of an EIS was inadequate and ordered the Secretary to comply with the procedures outlined in NEPA. This case set the stage for establishing that NEPA required agencies to seriously consider environmental issues in their decision-making processes.

While the district courts opened up the courthouse door to NEPA plaintiffs, the second level of federal courts welcomed them in. That the Circuit Courts of Appeal were particularly responsive to NEPA litigation was demonstrated in the first EIS case that came before a circuit court. Describing the case as *the* significant NEPA decision, Zillman and Gentles remark that *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* (AEC)[100] was, "... the right decision, at the right time, in the right place"

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[98] 330 F. Supp. 918 (M.D. Pa. 1971).

[99] A determination is a statement pursuant to the Department of Transportation Act which explains why the Department proceeds with projects.

[100] 440 F. 2d 1109 (D.C. Circuit, 1971).

for environmental plaintiffs.[101]

At issue in *Calvert Cliffs* were rules that the AEC adopted to consider the environmental impacts of their proposed actions. Rather than incorporate the CEQ's NEPA guidelines into its procedures, the AEC chose to use an independent hearing board to consider environmental factors. The plaintiffs argued that this practice violated NEPA because the hearing board did not examine environmental consequences unless they were brought to the board's attention by staff or outside parties nor did it consider such factors once the standards of other agencies were satisfied. The District of Columbia Circuit Court ruled in favour of the plaintiffs and rejected the AEC's so called plan for implementing NEPA in its decision-making process. The court held that the Commission's approach made a mockery of the Act and revealed a reluctance to comply with NEPA's procedural obligations.[102] *Calvert Cliffs* established that federal agencies could not substitute their own interpretations for the NEPA guidelines but rather must be responsible for implementing "...not only the letter, but the spirit of the Act."[103]

The D.C. Circuit ruling set the stage for active enforcement of NEPA by the federal courts. After the *Calvert Cliffs* decision, the circuit courts began considering NEPA litigation in terms of differentiating between substance and procedure. Some courts held that it was possible to substitute or modify an agency's action based on a negative EIS (a substantive ruling) while other courts held a strictly procedural view that courts

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[101] Donald Zillman and Peggy Gentles, "NEPA's Evolution: The Decline of Substantive Review" Environmental Law vol. 20 (1990), 511.

[102] *Calvert Cliffs*, 1116-17, 1119.

[103] Ibid., 1118.

only had the authority to ensure that an agency complied with the EIS requirement.[104] Without much guidance from the United States Supreme Court, the federal courts fluctuated between substantive and procedural rulings.

D. NEPA Goes to the Supreme Court

While the district and circuit courts fleshed out the EIS requirements, enforcing a strict standard of compliance on all federal agencies, the United States Supreme Court remained silent during the first three years of NEPA's existence. When the High Court began reviewing NEPA cases, its decisions raised questions in the environmental policy community about the effectiveness of the statute. While the Court has consistently affirmed district and circuit court rulings respecting NEPA's procedural requirements, it has rejected expansive readings of the statute.[105] An evaluation of the following decisions will demonstrate the Supreme Court's position.

In *Kleppe v. Sierra Club*,[106] an environmental group challenged the Department of Interior's decision not to prepare an EIS assessing the regional impacts of coal leasing and mining development.[107] The Sierra Club argued that the Department did not apply a four-part balancing test developed by the D.C. Circuit[108] to determine at what stage

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[104] Miller, 227-28.

[105] Zillman and Gentles, 514.

[106] 427 U.S. 390 (1976).

[107] Ibid., 395.

[108] *Sierra Club v. Morton* 514 F.2d 856, 880 (1975).

an agency must prepare an EIS. The Supreme Court rejected the Sierra Club's argument, ruling that the balancing test conflicted with NEPA's language, intruded into agency discretion, and unjustly encouraged litigation.[109] As to the first ruling, the court reasoned that based on the language of section 102(2)(c), agencies were only required to prepare a final EIS for proposals deemed to be major federal actions -- not the type that the Department was considering. Regarding the second and third rulings, the Court stated that NEPA only required the courts to check whether the agency considered the plaintiffs' environmental concerns. In the High Court's view, developing a four-part balancing test in addition to the NEPA requirements was clearly an intrusion of agency discretion which would subsequently lead to unnecessary litigation. In this case, the Supreme Court sent a warning to the lower courts that it was beyond their judicial powers to expand the meaning of NEPA.

In *Vermont Yankee Power Corporation v. Natural Resources Defence Council*,[110] the lower courts were again admonished for using an expansive reading of NEPA. This case involved rulemaking procedures established by the AEC for granting nuclear power plant operations. In two earlier cases the D.C. Circuit held that the AEC's procedures were inadequate under NEPA but suggested ways in which these procedures could be strengthened to ensure a comprehensive record which would fully consider all environmental issues.[111] The Supreme Court reversed the D.C. Circuit, again stressing

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[109] *Kleppe*, 412.

[110] 435 U.S. 519 (1978).

[111] See *NRDC v. Nuclear Regulatory Commission* 547 F.2d 633 (D.C. Cir. 1976); *Aeschliman v. Nuclear Regulatory Commission* 547 F.2d 622 (D.C. Cir. 1976).

the judiciary's limited role in reviewing federal agency actions under NEPA. The ruling further dismissed arguments that NEPA's mandate called for a more stringent review of agency actions, emphasizing that reviewing courts did not have the authority to develop additional procedural requirements for existing statutes.[112]

In more recent decisions, the Supreme Court remained consistent with its narrow reading of NEPA. For example, in *Robertson v. Methow Valley Citizens Council*,[113] an environmental group challenged the Forest Service's issuance of a permit following the completion of a final EIS to develop a ski resort near the Pasayten Wilderness Area in the northern part of Washington State. The wilderness area provides a winter range for one of the State's largest migratory mule deer herds. The plaintiffs argued that the final EIS was flawed because the Forest Service did not adequately consider mitigation measures for the herd.

The District Court upheld the Forest Service's EIS, saying that the study met all the requirements of NEPA. But on appeal, the Ninth Circuit reversed the lower court's decision stating that the discussion regarding both the range of alternatives and mitigation measures in the final EIS fell short of NEPA's requirements. The Circuit court held that it was impossible for the Forest Service to make a reasoned decision regarding the issuance of the permit when the EIS contained only a general discussion on mitigation measures. The Court concluded that when an agency lacks sufficient data, NEPA requires the agency to prepare a worst case analysis.

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[112] *Vermont Yankee*, 547-48.

[113] 490 U.S. 332 (1989).

When *Methow Valley* reached the Supreme Court, the Forest Service argued that the Circuit Court overstepped its authority when it interpreted NEPA to create new substantive requirements for agencies. The Supreme Court agreed with the agency's argument, reversed the Circuit's decision, and sent a message to the lower courts that they must defer to agency decisions once the NEPA process has been completed. The Court further warned that NEPA applies to the "process" of looking at environmental consequences, adding that the statute prohibits only "...uninformed -- rather than unwise -- agency action."[114]

While the facts in *Marsh v. Oregon Natural Resources Council*[115] differ from *Methow Valley*, the final result was essentially the same. This case involved a dam project on a tributary of the Rogue River in southwestern Oregon. This was the third in a trio of flood control dams built by the Army Corps of Engineers on the river -- the others were already completed. The Corps prepared an EIS for the project and subsequently recommended that the dam proceed in 1971. Following some initial work on the dam, the Corps halted the project in 1975 and prepared a supplemental EIS (SEIS) to consider its effect on water quality and fisheries. After the SEIS was released in 1980, construction on the dam resumed. The Oregon Natural Resources Council challenged the project, arguing that the Corps' SEIS failed to adequately consider mitigation measures, lacked sufficient worst case scenarios, and failed to address the combined impact that the three dams would have on the river.

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[114] *Methow Valley*, 350-51.

[115] 490 U.S. 360 (1989).

As in *Methow Valley*, the District court upheld the Corps' SEIS and again the Ninth Circuit court reversed the decision, ruling that the mitigation analysis was woefully inadequate. Here the Circuit based its decision on substantive determinations, considering whether the SEIS was "reasonably thorough" and whether it "enhanced" public participation. The Supreme Court reversed the decision, ruling that the Circuit violated the Administrative Procedure Act (APA), by moving beyond issues of law and intruding into issues of fact -- an area reserved for agency expertise. The Court held that this case was an example of a "factual dispute" requiring "substantial agency deference."[116]

It is clear, from the review of decisions above, that the Supreme Court views its role in enforcing NEPA as being a small one. An explanation behind why the Court holds this view lies in the APA. While this statute essentially provided a vehicle for reviewing federal government decisions,[117] it also limited the standard of judicial review that could be applied to NEPA. Miller states, "Because NEPA does not expressly provide a standard of review, the statute's procedures are categorized under section 706(2)(a) of the APA as informal rule-making."[118] Under the APA, a distinction must be made between law and fact to determine which standard of review applies to a particular case. The APA allows for judicial review of purely legal questions while factual questions are viewed as

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[116] Ibid., 376.

[117] Recall earlier discussion by McGarity outlining why NEPA litigation became the focus of environmental plaintiffs.

[118] Miller, 233.

being within the framework of agency expertise. So, if a dispute is based solely on factual questions, the court must defer to the discretion of the agency.[119]

In determining whether an issue is based on law or fact, the Supreme Court has extended what has been coined the "hard look" doctrine to environmental law. In this rule of administrative law, courts are not empowered to substitute their judgements for that of an agency but they insist that agencies take a "hard look" at all relevant factors of proposed actions.[120] In other words, the role of the judiciary is to ensure that agencies have complied with a statute's procedural requirements. But once an agency decides to proceed with an action, regardless of whether that action is environmentally devastating or not, courts do not have the statutory authority to question the substance of that decision.[121]

E. Nothing Ventured, Nothing Gained?

The Supreme Court's position regarding NEPA's standard of review leads one to consider the significance of this statute's accomplishments in the twenty or more years of its existence. On the positive side, many have come to the defence of the statute, arguing that NEPA has been important in the evolution of environmental decision-making. First and foremost, it is argued, NEPA opened the environmental decision-making process to outside interests. Andrews notes that NEPA has been responsible for

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[119] Ibid.

[120] Leventhal, 540.

[121] Fogleman, 139.

opening an agency's decision process to participation by anyone who might be affected by a proposed action.[122] He adds that while NEPA cannot by itself force all the changes that environmental plaintiffs seek, it has at least forced controversial actions into a highly visible arena.[123]

Supporters of NEPA also suggest that the statute created access to agency information via the EIS requirement. As discussed earlier, each agency is required by NEPA to publish its intent to prepare an EIS for a proposed action and then is subsequently responsible for making the final EIS available to the public. CEQ amendments to the EIS process also require agencies to prepare ROD's explaining why they decided to continue with or withdraw their proposed actions. With these requirements, NEPA clearly increased access to information to those who were formerly excluded from the decision-making process.

The opportunity to comment on an agency's EIS has been viewed by environmentalists as another strength of NEPA. We recall from the discussion of NEPA earlier that the public and other federal agencies may comment on draft EIS's prepared by agencies considering major federal actions. Commenting on EIS's, some authors suggest, is a useful political tool because it brings previously hidden environmental costs to light, the information in the EIS reports can be used to mobilize citizen opposition to

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[122] Andrews, 234.

[123] Ibid

projects, and it gives groups the legal grounds to participate in development decisions, enabling them to gain access to courts to challenge an inadequate EIS.[124]

Finally, NEPA supporters argue that federal agencies, largely in response to judicial decisions, now at the very least consider the environmental impacts of their proposed actions by preparing EIS's as required by the statute.[125] Culhane asserts that we must not, "...overlook the importance of [this] simple, but definitely non-trivial outcome of NEPA."[126] He adds that the existence of environmental impact assessment contrasts significantly with the days prior to the passage of NEPA when determining environmental consequences were rarely a part of agency decision-making.[127]

While the above arguments suggest that NEPA has had a positive impact on environmental decision-making, others offer more pessimistic appraisals of the statute's accomplishments. One criticism of NEPA's procedural requirement is that the EIS is seen as a process which perpetuates delay and increases expense but rarely alters agency development proposals.[128] Fairfax, one of NEPA's earliest critics, notes that when

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[124] Douglas Amy, "Decision Techniques for Environmental Policy: A Critique" in Robert Paehlke and Douglas Torgerson (eds) Managing Leviathan: Environmental Politics and the Administrative State (Peterborough: Broadview Press Ltd., 1990), 63.

[125] Robert Paelhke, "Participation in Environmental Administration: Closing the Open Door?" Alternatives vol 14(2), 45.

[126] Paul J. Culhane, "NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated" Environmental Law vol. 20 (1990), 690.

[127] Ibid.

[128] Paehlke, 46.

environmentalists challenged agencies in court, even legal victories did not halt or significantly alter many projects. She adds:

> "Beneath the flurry of exciting "victories" few people saw or would admit that the fruits of the efforts merely consisted of evermore complex and intricate requirements for processing papers."[129]

Amy asserts that, "...while a few projects have been altered or cancelled through the EIS, ...the overwhelming majority of projects go through the process unscathed."[130]

A second problem with NEPA is that it does not operate in a vacuum. Taylor points out that the EIS process is affected by political difficulties which subsequently make the enforcement of NEPA less forceful. For example, NEPA presupposes that agencies will consider all reasonable alternatives to a proposed action. But, unfortunately agency decision-makers rarely consider all alternatives because, understandably, government agencies are generally not rewarded for pointing out the potentially adverse "side effects" of their policies.[131] Culhane adds that "agencies rarely discuss realistic alternatives that are antithetical to the agency's mission."[132] Fairfax notes that supporters of NEPA overlook the fact that proposals exist because they have support both inside and outside an agency. These proposals, she asserts,

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[129] Sally Fairfax, "A Disaster in the Environmental Movement" Science Vol. 199 (1978), 747.

[130] Amy, 61-62.

[131] Taylor, 19.

[132] Culhane, 693.

> "...are indicators of agency values and commitments as well as statements of agency skills and potentials. Agencies have little motivation or capability to analyze alternatives they cannot carry out."[133]

So, although NEPA requires agencies to consider the environmental impact of their proposed actions, internal pressures or support and not adverse environmental effects often determine whether or not a project proceeds.

A third downfall of the NEPA process stems largely from the narrow standard of judicial review that the Supreme Court has applied to the statute. In light of the High Court's position, federal courts have come to view the preparation of EIS's as a mere formality. As long as agencies observe the requirement to write an EIS, courts generally rule in their favour in NEPA-based litigation.[134] Blumm points out that in NEPA's first decade, this pattern had already become established as the courts favoured agencies on the issue of the adequacy of an EIS in 72% of all NEPA cases filed.[135]

Responding to the courts' narrow standard of NEPA review, Miller notes that by the end of the environmental decade, "...with the decreased chances of prevailing, and in light of the costs involved in pursuing litigation, environmental plaintiffs have increasingly adjusted their strategies to de-emphasize litigation."[136] Statistics compiled

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[133] Fairfax, 745.

[134] Wenner, "Environmental Policy in the Courts" 200.

[135] Michael Blumm, "The National Environmental Policy Act at Twenty: A Preface" 20 Environmental Law (1990), 452.

[136] Miller, 235-36.

by the CEQ further illustrate this diminishing interest in NEPA litigation. In 1977, 938 NEPA cases were filed in the courts but by 1987, only 80 cases reached the court dockets, less than nine percent of the total a decade before.[137]

F. Substance vs. Procedure: Comparing NEPA to NFMA

Those who point out the flaws in NEPA often suggest that adding substantive sections to the statute would give it more force. For example, as early as the landmark *Calvert Cliffs* decision, Justice Wright acknowledged that the lack of substantive sections in NEPA would limit the force a court could have on an agency decision.[138] Rodgers also alluded to the impact of substantive legislation when he commented:

> "NEPA litigation with substantive aims rarely proceeds without the supporting presence of complementary federal legislation that supplies an *unmistakable* substantive component."[139]

Finally, Miller suggests, "Adding substantive provisions to NEPA is an obvious first step toward heightened protection of the environment."[140]

One federal statute which has received attention for its substantive content is the National Forest Management Act (NFMA).[141] Enacted in 1976, Anthony Wendtland

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[137] Blumm, 453.

[138] *Calvert Cliffs*, 1115.

[139] Rodgers, "A Hard Look at Vermont Yankee" 67 Georgia Law Journal (1979) 710-11.

[140] Miller, 255.

[141] 16 U.S.C. 1600.

asserts that the NFMA was added to the Forest Service resource planning scheme primarily for two reasons. First, it was a congressional response to public concern over Forest Service practices which promoted extensive clearcutting. Second, Congress saw a need for long-range forest planning at the local forest level.[142]

While the NFMA continues to allow the Forest Service to use clearcutting in timber management plans, it does so only in extreme circumstances. First, the Act determines which lands are suitable for timber sales. Lands found to be unsuitable are withdrawn from timber production and undergo reforestation for at least 10 years. Second, NFMA limits the amount of timber that may be harvested as growth and size restrictions are placed on harvesting and is based on a sustained yield basis. Third, the Act constrains the Forest Service from using clearcutting unless it is the optimum method. Substantive limitations to clearcuts include that they blend into the natural terrain, remain under established maximum size limits, and protect all other forest resources.[143]

The NFMA regulations, completed in 1982, established a ten step process for forest planning at the local level. Included in the regulations are clauses for public participation in forest management decision-making, limits to how much timber the Forest Service may sell, and minimum specific management requirements that guide forest planning. Parent suggests that these types of clauses are examples of substantive

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[142] Anthony T. Wendtland, "The National Forest Management Act of 1976: A Critical Look at Two Trees in the NFMA Forest" Land and Water Law Review vol. 22 (1987), 418.

[143] Stephanie Parent, "The National Forest Management Act: Out of the Woods and Back to the Courts?" 22 Environmental Law (1992), 710-11.

limitations and procedural restrictions which give the courts more law to apply both quantitatively and qualitatively. She emphasizes that the NFMA is more specific and thus more substantive than previous forest management legislation.[144]

Seattle Audubon Society v. Robertson is one case that illustrates a court's willingness to apply these substantive and procedural laws to agency decision-making.[145] This case involved a legal action initiated by the Seattle Audubon Society (SAS) which challenged the Forest Service for not complying with the NFMA when the agency tried to log northern spotted owl habitat areas. SAS charged that the Forest Service failed to assure the viability of a threatened species, a requirement of the Act, in its 1990 timber sale plan. The Forest Service defended its plan based on the following arguments. First, since the spotted owl was a threatened species, as defined under the Endangered Species Act (ESA), the Forest Service's obligation to the bird had ceased. The agency rationalized that the ESA superseded the NFMA, so the agency responsible for enforcing the former statute (the Environmental Protection Agency (EPA)) was required to ensure that the spotted owl maintained a viable population. Second, the Forest Service also claimed that it could by-pass NFMA procedures in managing its timber sales by substituting the development of an NFMA regional guide for recommendations from an Interagency Scientific Committee (ISC) report concerning the conservation of the spotted

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[144] Ibid., 711.

[145] (1991 U.S. Dist. LEXIS 10131).

owl. The Forest Service argued that the ISC report could be construed as a set of guidelines with the same legal consequences as a regional guide.[146]

The court responded to the first argument by stating that the NFMA and ESA were concurrent. Furthermore, the court argued, "The listing of the spotted owl as a threatened species did not relieve the Forest Service of its obligations under NFMA." Regarding the second argument, the court held, "The difficulty with this argument...is that it assumes an administrative agency has the power to omit procedures required by law when it believes they would be unnecessary or inconvenient." The court recognized that while the ISC report was highly regarded, an agency could not substitute its intention to follow a report for the procedures required by law. In this case, the court directed the Forest Service to comply with both procedural and substantive requirements of the NFMA. Procedurally, the agency was bound to follow the procedure of producing standards and guidelines for its timber sale plans. Substantively, the agency was required to ensure that a viable population of the spotted owl was maintained regardless of Forest Service activities in its habitat.[147]

If substantive clauses produce such desired results why not consider adding similar clauses to NEPA? This thought was indeed given a great deal of consideration by several members of Congress following the Supreme Court rulings in *Methow Valley* and *Marsh*. Recalling the uproar that followed these decisions, Rossman commented:

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[146] Ibid., 725.

[147] Ibid., 726.

> "While numerous amendments to NEPA have been offered in the intervening years, the High Court's decision in Methow Valley
> appears finally to have ignited the engine of legislative correction"[148]

He was referring to two separate bills that were introduced to the House of Representatives and the Senate during the 101st Congress which in part called for the inclusion of substantive clauses to NEPA.

Bill H.R. 1113 was introduced in direct response to the *Methow Valley* decision. Among other things, the bill would require federal agencies to evaluate and implement mitigation measures for proposed actions. The agencies would also be required to review the effectiveness of the mitigation measures once they were implemented. Bill S. 1089, introduced into the Senate at approximately the same time, was similar to H.R. 1113 in that it called for fully developed mitigation plans.

Like many bills introduced in Congress, H.R. 1113 and S. 1089 languished in committee, stalling the engine to legislative reform of NEPA that Rossman spoke about. The bills eventually died on the order paper at the close of the 101st Congress, stifling the hopes of environmentalists, Congress members, and judges alike who, for many years, called for substantive changes to NEPA. Soon after the close of Congress, Blumm noted:

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[148] Antonio Rossman, "NEPA: Not So Well at Twenty" 20 ELR 10177.

> "An apparent political consensus holds that amending NEPA to ensure that its goals are not obscured by its procedures would be politically unwise. As a result, Congress has acquiesced in the statute's substantive demise."[149]

While attempts were made to revitalize the bills during the 102nd Congress,[150] they eventually met the with the same demise as the original bills. Since no attempts at legislative reform of NEPA are forthcoming, it appears as though the statute will likely continue to be enforced with a standard of judicial review which is highly deferential to agency discretion.

G. CONCLUSION

The evaluation of NEPA litigation discussed above suggests that there are mixed reviews about using the legal system to enforce environmental impact assessment. On the one hand, some assert that judicial review of NEPA has effectively forced federal agencies to comply with the statute's procedural requirements as agencies are more inclined to prepare an EIS rather than be challenged in court for failing to do so. But on the other hand, there are those who argue that judicial enforcement of NEPA's procedures has produced only limited gains for environmental protection because NEPA litigation has rarely, if ever, resulted in permanently stopping an environmentally damaging proposal.

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[149] Blumm, 453.

[150] See bills H.R. 67 and S. 533.

To what should we attribute this less than favourable outcome of NEPA litigation? One explanation lies in the application of the rule of administrative law to NEPA review. Unlike constitutional review, where courts may substitute their decisions for those of an agency, judicial review of NEPA is limited to a narrow analysis as required by the Administrative Procedure Act. As the Supreme Court decisions discussed above illustrate, judges are simply restricted to ruling on procedural issues in NEPA cases -- issues of substance are left entirely to agency expertise.

Another explanation why NEPA litigation has had a limited impact on agency decision-making is that environmental plaintiffs have asked the courts to enforce a law that does not exist. While NEPA requires that agencies prepare EIS's for major federal actions, nowhere in the statute does it require those agencies to choose an environmentally sound proposal once the EIS is completed. The non-binding nature of NEPA means that courts cannot force an agency to choose an environmentally sound proposal over a poor one once that agency has complied with the EIS requirement.

This leads to a third explanation why NEPA litigation has produced less than favourable outcomes in protecting the environment. As discussed above, some suggest that substantive changes to NEPA would indeed give the statute more force. Such changes could make the findings in EIS's binding on agencies and give courts more law to apply when agencies do not comply with the statute. But these types of changes must originate in the legislative branch of government. And while some Congress members have attempted to add substantive sections to NEPA, they have not succeeded in passing these amendments. Thus, in light of the narrow standard of judicial review, the non-binding

nature of NEPA, and the lack of political will to increase NEPA's force, the boundaries of effectiveness of judicial review of this statute is limited to enforcing its procedural requirements.

III. TESTING THE LEGAL WATERS: THE FRIENDS OF THE OLDMAN RIVER AND ENVIRONMENTAL ASSESSMENT LITIGATION

> "Today is a great day not just for the Oldman River, but for the environment of Canada as a whole. This decision has major implications for...projects in the future involving the environment and environmental jurisdiction across Canada."[151]

> "I'm ecstatic! This is terrific! It means that the dam is illegal. The Alberta government has to apply for federal approval or tear down the dam."[152]

Environmentalists across Canada were euphoric when the Supreme Court of Canada ruled in favour of the Friends of the Oldman River (FOR) in January 1992. The decision, which ordered the federal Minister of Transport to comply with Canada's EIA process, marked a culmination of years of effort by FOR to force the provincial and federal governments to conduct a public review of the dam. The ruling was hailed as the most significant environmental law decision in Canadian history and environmentalists predicted that it would drastically change the way development proposals would proceed in Canada, for governments could no longer ignore the environment when considering major developments.[153]

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[151] Martha Kostuch in "Oldman Appeal Rejected: Court rules for Environment" Edmonton Journal 24 Jan. 1992.

[152] Martha Kostuch in "Decision leaves dam vulnerable: Ruling on federal reviews ammunition for Oldman foes" Globe and Mail 24 Jan. 1992.

[153] Edmonton Journal 24 Jan. 1992.

The Supreme Court affirmed a lower court decision which deemed the federal Environmental Assessment Review Process Guidelines Order (EARP) a law of general application.[154] The Court further held that EARP was to be applied to any proposal that affected areas of federal responsibility. Thus, the Guidelines Order was a mandatory law that was to be applied equally to all major federal undertakings.

But while this marked a significant change in the application of the federal EIA process, the findings of the previous chapter suggest that we should be cautious about the policy gains that may be achieved when using judicial review as a political strategy. After reviewing the record of NEPA litigation in the U.S., one cannot help but wonder if FOR's view of the success of the courts was an overly optimistic one. We recall that U.S. courts enforced the procedural requirements of NEPA but did not have the judicial power to force agencies to comply with the findings of EIS's. In light of these findings, it would be wise to evaluate FOR's success in the courts with some degree of caution as many of the questions regarding the effectiveness of EIA in chapter two may also be raised with respect to the Oldman case.

Thus, it is with these concerns in mind that this chapter sets out to examine FOR's success in the legal forum. The chapter begins with a discussion of the federal EIA process in place at the time FOR sought application to the Federal Court of Canada (Trial Division) to force the federal government to conduct an environmental review of the Oldman dam. The chapter then turns to a review of Canada's standing law and discusses the impact it had on FOR's legal actions. The Oldman story then picks up

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[154] *Canadian Wildlife Federation v. Canada* (1989) 99 N.R.72.

where it left off in the first chapter and examines the Federal Court of Appeal and Supreme Court decisions and discusses the outcomes of the litigation. The Wood Buffalo case is then introduced as an example of a substantive legal victory. Finally, the chapter concludes with some thoughts regarding the impact of EIA litigation on the Oldman dam.

A. The Federal Environmental Impact Assessment Process

The environmental regulatory process in Canada is based on a closed, consensual, and consultative approach to policy-making. Traditionally, it has been closed to outside interests and has restricted the release of information to both environmental groups and the general public. It relies on a consensual non-politicized civil service to implement regulatory changes. Finally, regulators have been granted a considerable degree of discretion to consult with and negotiate with interested parties free from much public interference.[155] It is within this closed decision-making framework that the federal Environmental Assessment Review Process (EARP) was established.

Unlike in the U.S. where policy-makers chose to place federal EIS procedures in legislation, Canada's environmental assessment process began slowly, first being established as an administrative procedure. While the development of EIA in Canada was inspired by NEPA, when an interdepartmental task force recommended that Ottawa emulate many of the policies found in the American statute in its own legislation, the

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[155] Peter Nemetz, "Federal Environmental Regulation in Canada" Natural Resources Journal Vol 26 (Summer 1986), 551.

federal government disagreed.[156] For example, Ottawa chose not to accept the recommendation to enshrine environmental assessment in legislation, but instead established loosely organized regulatory schemes that allowed for intergovernmental and interdepartmental negotiation. Also, rather than forming a review agency similar to the U.S. Environmental Protection Agency, Cabinet set up the Federal Environmental Assessment Review Office (FEARO) with far more limited powers than its American counterpart.[157] The rationale behind this approach was to avoid any possible confrontation with federal agencies who were unaccustomed to following directives from another department.[158]

The Environmental Assessment Review Process (EARP) was first introduced as a Cabinet Directive in 1973. EARP was divided into two stages -- self assessment and public review. The first stage demonstrated a closed decision-making process at its finest. The department responsible for a development (initiating department) was required by EARP to conduct a self assessment of the proposal. The purpose of the self assessment was to determine whether the proposal, if approved, would have a significant impact on the environment. Factors to consider at this stage included reviewing technical information and data collected from its department, seeking comments from experts

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[156] Ted Shrecker, "Of Invisible Beasts and the Public Interest: Environmental Cases and the Judicial System" in Robert Boardman (ed.) Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1992), 96.

[157] Ibid.

[158] Marie-Ann Bowden and Fred Curtis, "Federal EIA in Canada: EARP as an Evolving Process" Environmental Impact Assessment Review vol. 8 (1988), 101.

within the federal government, and monitoring initial public reaction to the proposal.[159]

Following the completion of the self assessment, the initiating department would decide whether the impacts of the proposal were significant enough to warrant a public review. If the department determined that the project had no significant impacts or that the impacts could be mitigated, the proposal did not undergo a public review. On the other hand, if the department found that the proposal had a significant environmental impact, it was referred to the Minister of the Environment who would then subsequently refer the proposal to FEARO to appoint an independent panel to review the project.[160]

The Environmental Assessment Panel (EAP) established guidelines for the initiating department to follow while conducting a more in-depth environmental impact assessment (EIA) than the original self-assessment. When this EIA was completed, it was submitted to the EAP and if satisfied that the assessment met the requirements of the guidelines and no further study was necessary, the Panel signalled the beginning of the second stage of EARP. Up to this point, there was virtually no opportunity for public input apart from the monitoring of public reaction to the proposal by the initiating department.[161]

The Panel set up a series of public meetings concentrated in the area of the proposed development. The purpose of these meetings was to, "..provide an opportunity...to hear the concerns and opinions of the public, primarily the local citizens,

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[159] FEARO, Guide for Federal Screening (Ottawa: FEARO, 1978).

[160] Ibid.

[161] Ibid.

that may be affected by the project."[162] At the conclusion of the hearings, the Panel prepared its final report. The report was subsequently presented to the Environment Minister who, in consultation with the minister of the initiating department, considered whether or not the recommendations would be adopted.[163]

The early process was widely criticized for the overwhelming discretion given to federal ministers in a process that virtually excluded outside actors from becoming involved in environmental decision-making aside from making submissions to public hearings. Critics called for provisions to place EIA procedures into a statute to enforce more agency compliance with Panel recommendations, increase the number of proposals to be subjected to EIA, and provide for more public participation in the process.

Responding to this criticism, the government made revisions to EARP in 1984. Most notably, EARP was changed from a Cabinet directive to a Guidelines Order[164] under the Government Organization Act, 1979.[165] This change made it mandatory for initiating departments to comply with EARP in assessing proposed developments.[166] The Guidelines Order also established a mandate to subject more development proposals to

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[162] FEARO, Environmental Assessment Panels - What They Are, What They Do (Ottawa: Minister of Supply and Services, 1980).

[163] Ibid.

[164] SOR 84/467.

[165] SC 1978-79, c.13 c.14.

[166] SOR 84/467, s. 6.

environmental review.[167] Each department was required to develop lists of proposals that would or would not produce adverse environmental effects. Those proposals deemed to produce adverse impacts, would automatically be referred to the Minister of the Environment for public review, while those not significantly affecting the environment would be excluded from the EARP process.[168] The initiating department had sole authority in determining under which list a project would fall.[169]

Regarding changes to public participation, the Guidelines Order required that interested parties have access to all relevant information at the public review stage.[170] The amendments also allowed the public sufficient time to examine and comment on the information prior to the commencement of the public hearing.[171] Another substantial change to EARP was to allow sufficient public concern regarding adverse environmental impacts of a proposal to warrant a public review.[172] But, the initiating department still maintained a great deal of discretion in such a case as it was the department's Minister who determined whether the concern expressed was enough to refer the proposal to EARP.

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[167] David Vanderzwaag and Linda Duncan, "Canada and Environmental Protection: Confident Political Faces, Uncertain Legal Hands" in Robert Boardman (ed.) Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1992), 10.

[168] SOR 84/467, s. 11.

[169] Ibid., s. 12.

[170] Ibid., s. 28.

[171] Ibid., s. 29.

[172] Ibid., s. 13.

While the amendments in 1984 attempted to clarify and finetune the federal EIA process, critics argued that they failed to alleviate many of the shortcomings of EARP. For example, Hoberg asserts that the amendments did not change the legal status of the Guidelines Order nor did they clearly address whether governments could be forced to comply with the recommendations of Environmental Assessment Panels.[173] Schrecker notes that public hearings under EARP continued to have only an advisory capacity and the recommendations submitted by the review panels were not binding on the Minister's decision to proceed with or drop a project.[174] Hunt argued that too many projects continued to be screened out of the EIA process as a result of the discretion granted to the initiating department.[175] Finally, the opportunity for the public to participate was still largely concentrated at the public review stage.

The shortcomings of EARP led several critics to suggest that some form of review of government environmental decision-making was necessary.[176] But, due to the poor record of agencies at all levels of government, environmentalists argued that this reviewing role should not be entrusted to political officials. The process of improving environmental assessment was hence taken out of the hands of legislators and placed in the hands of the judiciary after environmental groups initiated legal actions to force

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[173] Hoberg, "Representation and Governance," 15-16.

[174] Schrecker, "Of Invisible Beasts," 96.

[175] Constance D. Hunt, "A Note on Environmental Impact Assessment in Canada" Environmental Law vol 20, 796.

[176] Ted Schrecker, "The Canadian Environmental Assessment Act: Tremulous Step Forward or Retreat into Smoke and Mirrors" Canadian Environmental Law Reports (N.S.) vol 5 (1991), 203.

governments to comply with their own regulations.[177] So after years of avoiding the legal forum, EARP was challenged by environmentalists, first in the Rafferty-Alameda dam case and second by the Friends of the Oldman River.

B. Overcoming Barriers to Litigation - The Standing Law

By the late 1980's, an increasing number of lawsuits was being launched by Canadian environmental groups to protect the environment.[178] Virtually absent from the legal forum in the early 1980's, by the latter part of the decade environmental groups including the Friends of the Oldman River pursued their policy battles in court. That these groups were given the opportunity to present their case before a judge suggests that the standing law, a legal right to bring an action to court, underwent substantial changes. In fact, Canadian environmentalists were not welcomed to the courthouse door as quickly and as easily as their counterparts in the United States. No form of public interest standing comparable to that in the U.S. existed prior to 1986 nor did groups qualify for individual standing as this was granted only to those persons who suffered a specific harm peculiar to themselves and separate from the general public.[179] Since environmental damage was viewed by the legal forum as affecting all of the public similarly, the only

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[177] Hoberg, "Representation and Governance," 16.

[178] Tingley, "Public Interest Groups," 1.

[179] Andrew J. Roman and Mart Pikkov, "Public Interest Litigation in Canada" in Donna Tingley (ed.) Into the Future: Environmental Law and Policy for the 1990's (Edmonton: Environmental Law Centre, 1990), 169.

means available to legally challenge environmental problems was through the public nuisance rule.

Persons who had standing to initiate a legal challenge in this case fell under three categories. First, the Attorney-General as guardian of the public interest,[180] was responsible for representing the community as a whole.[181] Second, a surrogate from the community known as a relator could also bring an action in the public nuisance upon receiving the permission of the Attorney-General. Third, an individual who suffered some special or unique harm in a particular case was also granted standing in this type of case.[182] Since the first and third categories essentially excluded interest groups (in the former, the Attorney-General had sole decision-making authority in choosing public nuisance cases and the latter was restrictive to interest groups for it was difficult to prove a connection to the case unique from the community as a whole), the following discussion will examine the relator category to demonstrate how groups had limited access to the courts in public interest cases.

After receiving the Attorney-General's consent to proceed with the motion, the relator was responsible for instructing counsel, bringing the action to court, and remaining personally liable for the costs if the action proved to be unsuccessful.[183]

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[180] Ontario Law Reform Commission, Report on the Law of Standing (Toronto: Ministry of Attorney-General, 1989), 10.

[181] Roman and Pikkov, 169.

[182] Ontario Law Reform Commission, 10.

[183] Unlike in the U.S., if plaintiffs lose a legal challenge, they are responsible for paying the expenses of their opponents in addition to their own substantial legal costs. See Roman and Pikkov, 179.

Once the motion reached the courts, the proceedings were brought in the Attorney-General's name and the relator was virtually at the mercy of the Attorney-General as he had very little say in the way the case proceeded.[184] Throughout the duration of the proceedings, the Attorney-General had the authority to approve the pleadings, apply for a stay of proceedings, or discontinue the action without seeking the approval of the relator. The relator had no further means of recourse if the Attorney-General chose one of the latter two actions as his decision was absolute and unreviewable in the courts.[185]

Evidently, relator actions were considerably rare not simply because of the limitations placed on persons who pursued them but also because the Attorney-General was hesitant to approve actions that were in direct conflict with his government. For example, he had to consider the positions of fellow Cabinet members as well as the views of potential corporate defendants when deciding whether or not to allow such actions.[186] Thus, the Attorney-General's responsibilities were contradictory for while he represented the public interest, at the same time his discretion in public nuisance cases allowed him to dismiss cases against a government to which he was also responsible.[187]

Had the public nuisance rule continued to be the only legal means available to challenge a public wrong, it is unlikely that the Oldman case would have been challenged in court. Fortunately for the Friends of the Oldman River, the Supreme Court of Canada

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[184] Ibid., 169.

[185] Ontario Law Reform Commission, 11.

[186] Ibid., 17.

[187] Ontario Law Reform Commission, Report on the Law of Standing: Executive Summary (Toronto: Ministry of Attorney-General, 1989), 1.

rejected the traditional rules and adapted a more flexible and discretionary approach to standing. Beginning with *Thorson v. Attorney-General of Canada*[188] and continuing in two subsequent cases,[189] the Court developed a more relaxed interpretation of standing in constitutional cases. In these cases, the Court held that a plaintiff would be granted standing if he could prove all of the following: first, that a serious issue as to the potential invalidity of the legislation existed; second, that the plaintiff was affected by the issue directly or that either the plaintiff had a genuine interest as a citizen in the question of the validity of the legislation and; third, that there was no other reasonable and effective manner in which the issue could be brought before the court.[190]

The three rulings did not have much of an impact on environmental law for they dealt specifically with applying standing to constitutional challenges. Since many environmental legal challenges dealt with administrative and not constitutional law, the traditional public nuisance doctrine continued to apply in this area.[191] It was not until 1986 in the *Minister of Finance v. Finlay*,[192] when the Court extended its standing rule to apply to challenges to administrative law, that environmentalists were given the opportunity to advance their goals in the judicial forum.

At issue in *Finlay* was whether the approach to standing in constitutional challenges

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[188] (1975) 1 S.C.R. 138.

[189] *Nova Scotia Board of Censors v. McNeil* (1976) 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski* (1981) 2 S.C.R. 575.

[190] Ontario Law Reform Commission, The Law of Standing, 24.

[191] Ibid., 26.

[192] 2 S.C.R. 607.

developed by the Court could be applied to non-constitutional cases. The Court found that Finlay did not have status under the general standing rule because the prejudice he claimed to suffer under the legislation in question was too indirect. However, using its discretion, the Court granted Finlay "public interest standing" based on the three general rules established in the previous cases.[193] The Court affirmed that individuals questioning the legality of government actions should be given the right of access to the courts.[194]

The Supreme Court's development of public interest standing broke down the barriers to interest groups who were formerly unable to challenge infringements of public rights in the legal forum. The changes proved to be encouraging for environmental groups who, prior to *Finlay*, had to rely on convincing the Attorney-General to initiate legal proceedings against his own government when an administrative action was called into question. The impact that the liberalized rule had on the Oldman case was particularly evident, for the standing of the Society was not challenged when it sought application to the Federal Court Trial Division in April, 1989. Indeed by the time FOR initiated its first legal action against the Oldman dam, public interest standing was becoming accepted in the judicial forum.

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[193] Donna Tingley, "Recent Developments in Public Interest Environmental Law," 7.

[194] Ontario Law Reform Commission, The Law of Standing, 28-29.

C. The Oldman River in the Federal Courts

Several factors eventually brought the Friends of the Oldman River Society (FOR) to Canada's federal courts. First, numerous attempts at stopping the construction of the dam in Alberta courts had produced less than encouraging results. Although FOR succeeded in having an Alberta court rule that the dam's interim construction licence was invalid,[195] in the many legal challenges that followed in the provincial courts not one ruling ordered that construction on the dam stop or that the provincial government conduct a public environmental assessment review of the project.

Second, FOR was also unable to convince two federal ministers to conduct a federal public environmental review of the Oldman dam during its earlier stages. When contacted by the Society in 1987, the Minister of Fisheries and Oceans responded that he would not order an assessment because he believed that Alberta had addressed all potential problems respecting the fisheries. The minister was also reluctant to act for he did not want to hinder the long-standing administrative arrangements in place between the two levels of government pertaining to the management of fisheries in Alberta.[196] The Minister of the Environment similarly declined to take action in the Oldman case for he felt that the project fell primarily within provincial jurisdiction and was satisfied that Alberta's mitigation plan would remedy any detrimental effects on the fisheries.[197]

Finally, FOR was particularly encouraged by the advancements that the Canadian

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[195] *Friends of the Oldman River Society v. Minister of the Environment of Alberta* (1987) 2 C.E.L.R. 234.

[196] *Friends of the Oldman River v. Canada* [1992] 1 C.S.C.R. 22.

[197] Ibid., 23.

Wildlife Federation (CWF) made in the Federal Court.[198] At issue in this case was the Saskatchewan government's plan to build two dams on the Souris River in the southern part of the province. The CWF commenced proceedings against the federal Environment Minister for failing to comply with the EARP Guidelines Order before issuing a licence under the International River Improvements Act to begin the project. The Court ruled in favour of the CWF, holding that EARP was statutory in nature and was thus mandatory in any case which affected an area of federal responsibility.[199] This case was a major driving force behind FOR's decision to challenge the Oldman dam in the federal courts, for after seeing the gains that the CWF made, FOR sought application to the Federal Court Trial Division only eleven days after the CWF ruling was delivered.

FOR commenced proceedings in the Federal Court against two federal ministers on 21 April 1989.[200] The Society challenged the Minister of Transport for failing to comply with EARP before issuing a construction permit for the dam. The Minister of Fisheries and Oceans was also challenged for neglecting to order an environmental assessment of the project. Unlike the CWF case, however, when the Court delivered its decision on August 11, 1989, it dismissed FOR's action. The Court first held that the Transport Minister was not bound by EARP because the Navigable Waters Protection Act (NWPA), under which the permit was granted, did not require the Minister to prepare

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[198] *Canadian Wildlife Federation v. Canada (Minister of Environment)* [1989] 3 F.C. 309.

[199] When Saskatchewan appealed the decision to the Federal Court of Appeal, the lower court's ruling was upheld. See *Canadian Wildlife Federation v. Canada* (1989) 99 N.R. 72.

[200] *Friends of the Oldman River Society v. Canada* [1990] 1 F.C. 248.

an EIA prior to approving the project.[201] The Court further ruled that the Fisheries Minister was not required to comply with EARP in this case, for, according to the Department of Environment Act, he was not an "initiating department" with a decision-making authority in relation to the project.[202] Other reasons for dismissing the action included the delay in initiating the action (the dam was already 40% complete at this point) and the duplication that a federal EIA would produce.[203]

Convinced that the trial judge erred in his interpretation of EARP, FOR appealed the ruling to the Federal Court of Appeal four months later. Encouraged by a recent decision by that same Court to force an environmental review of the Rafferty-Alameda dams in Saskatchewan, FOR was optimistic that the Oldman ruling would be overturned.[204] By January 23, 1990, when FOR commenced proceedings in the Court of Appeal, the dam was approximately 70% complete.[205]

It was March before the Court of Appeal handed down its ruling in the Oldman case.[206] The decision overwhelmingly supported the Society, as the Court unanimously reversed the lower court's decision on all grounds. Justice Stone, speaking for the court, held that he could not agree with the trial court's judgement regarding the responsibility

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[201] Ibid., 268-69.

[202] Ibid., 270-71.

[203] Ibid., 273-74.

[204] "Dam opponents resume court fight" Calgary Herald 13 Jan. 1990.

[205] "Oldman dam critics have high hopes" Calgary Herald 24 Jan. 1990.

[206] *Friends of the Oldman River v. Canada* [1990] 2 F.C. 18.

of the federal ministers. Stone dismissed the argument that the Transport Minister was restricted to considering only factors affecting marine navigation, for this conclusion was contrary to the far-reaching meaning of EARP as a law of general application. He further held that the dam clearly fell within the purview of section 6(b) of EARP as a proposal that may have an effect on an area of federal responsibility.[207]

Regarding the Fisheries Minister's responsibility in this case, the Court considered whether the Minister was faced with a proposal affecting an area of federal responsibility in which he was a decision-making authority. Since the Minister had been contacted earlier by FOR, he was clearly aware of the project's potential adverse affect on the fisheries. Also, FOR's request required the Minister to make a decision as to what action to take with respect to the dam. Thus, the Court reasoned, the Minister was an initiating department with a decision-making authority for an initiative that may affect an area of federal responsibility.[208]

Justice Stone also reversed the trial court's decision respecting the duplication of the federal review process. The Court acknowledged that while the province conducted much detailed work and study to examine the environmental impacts of the dam, there were two areas where the provincial studies did not measure up to EARP. First, EARP, unlike the Alberta studies, allowed for the expressing of public concern. The Court noted that Alberta's laws placed much less emphasis on the role of public participation in the environmental review process. Second, EARP guaranteed the independence of the review

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[207] Ibid., 38-39.

[208] Ibid., 46.

panel while the provincial laws did not.[209] Thus, the federal ministers were ordered to comply with EARP and begin a public review of the dam.

FOR welcomed the decision, calling it a major victory for the environment.[210] While the Society acknowledged that the Court ruling did not actually force the government to stop construction while a public review was conducted, Martha Kostuch asserted that since "...they (Alberta) do not have a licence... we believe it would be morally wrong for them to continue construction."[211] Kostuch also warned that the Society was prepared to return to court immediately if construction continued over the following weeks.[212]

But FOR's idea of morals was not uppermost in the mind of the Alberta Public Works Minister following the Court of Appeal ruling. While environmentalists and opposition members called on the province to halt the dam's construction and honour the spirit of the court's ruling, Ken Kowalski responded by stating that his government had no intention of delaying the project. Kowalski also asserted that since the court decision did not order work on the project to stop while an EIA was performed, construction would continue according to plans.[213] Premier Getty also affirmed that Alberta would appeal the decision to the Supreme Court of Canada because the province believed that

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[209] Ibid., 50.

[210] "Oldman work to go on despite ruling" Edmonton Journal 14 Mar. 1990.

[211] "Ruling won't stop dam work" Calgary Herald 14 Mar. 1990.

[212] Ibid.

[213] Ross Howard & Miro Cernetig, "Assessment of Alberta dam on environment, Ottawa ordered" Globe and Mail 14 Mar. 1990.

the Federal Court erred in ordering a federal assessment of a project that was exclusively within provincial jurisdiction.[214] One Minister in the Alberta camp publicly expressed concern over the federal government's authority in the Oldman dam case. Environment Minister Ralph Klein indicated that he was concerned that the Transport Minister might use his power to stop work on the dam. The federal minister, as issuer of the construction licence, did have the authority under the NWPA to issue a stop-work order while an assessment panel conducted a review of the project.[215]

In the interim between the Federal Court ruling and the Supreme Court hearing, much activity surrounded the Oldman dam. The federal Transport Minister eased Klein's concern when he announced that Ottawa would not issue a stop-work order when an EARP panel was appointed to assess the dam.[216] Alberta was also relieved by the federal Justice Minister's announcement that the federal government would not prosecute Alberta over allegations that the dam contravened the Fisheries Act.[217] But, following increasing public and legal pressure by FOR, the federal Environment Minister appointed an EARP panel to review the project.[218]

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[214] Scott McKeen & Lynda Shorten, "Alberta, Ottawa face dam ultimatum" Edmonton Journal 15 Mar. 1990.

[215] "Ruling won't stop dam work" Calgary Herald 14 Mar. 1990.

[216] "Ottawa won't halt Oldman work, minister says" Edmonton Journal 25 May 1990.

[217] "Alberta off legal hook in Oldman dam battle" Edmonton Journal 11 July 1990.

[218] "Panel will hire own experts to review the Oldman dam work" Calgary Herald 22 Nov. 1990.

The Oldman River's day in Canada's highest court finally came when, after deliberating over the case for almost one year, the Supreme Court delivered its decision on 23 January 1992.[219] Writing for the majority in an eight-to-one ruling, Justice La Forest first remarked that, "The protection of the environment has become one of the major challenges of our time."[220] He then went on to dismiss all but one of the arguments brought forth by the provincial and federal governments. The Court first upheld the statutory validity of EARP, disagreeing with Alberta's contention that the guidelines were mere administrative directives and not mandatory legislation. Rather, the Court reasoned that EARP was given authority under the federal Department of Environment Act and was thus mandatory for all projects affecting areas of federal responsibility.[221] The Court was equally unconvinced by the provincial and federal governments' argument regarding EARP's inconsistency with the NWPA. Reaffirming the lower court's decision, Justice La Forest held that the duties imposed on the Transport Minister under EARP were in no way inconsistent with his duties under the NWPA.[222]

Alberta's contention that the Guidelines Order applied only to new federal projects was also dismissed by the Supreme Court. Alberta argued that section 5(a)(ii) of the Department of Environment Act[223] restricted the application of EARP to programs of

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[219] *Friends of the Oldman River v. Canada* [1992] 1 C.S.C.R. 3.

[220] Ibid., 16.

[221] Ibid., 34-35.

[222] Ibid., 41.

[223] R.S.C., 1985, c. E-10.

the Government of Canada and thus did not apply to provincially sponsored projects. But Justice La Forest remarked, "...Alberta seeks to place an unduly narrow construction on the extent of the Minister of Environment's duties and functions..."[224] The ruling continued that as long as a proposal existed in which Ottawa had a decision-making responsibility, it triggered the application of the EARP as was the case with the Oldman project.[225]

Justice La Forest was at variance with the lower court's ruling respecting which federal minister was the decision-making authority in the Oldman case. The Supreme Court reasoned that under the NWPA, the Transport Minister's approval is required before any work substantially interfering with navigation may proceed. The Act also empowers the Minister to impose terms and conditions that must be met prior to granting an approval of a project. If the conditions are not met, the Minister has the authority to stop or alter the project.[226] The Court found that the Fisheries Minister had no equivalent legislative responsibility and was thus not a decision-making authority in this case. But while the Transport Minister was held to be the sole decision-making authority, the Court did warn that an environmental assessment could not be restricted to navigation for EARP required the Minister to assess the impact on all related areas of federal jurisdiction.[227]

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[224] *Friends of the Oldman River v. Canada*, 43.

[225] Ibid., 44-45.

[226] Ibid., 48.

[227] Ibid., 49-50.

Finally, at the request of the Alberta government, the Court considered the issue of the constitutional validity of the Guidelines Order. The province argued that the authority EARP gave the federal government over the environment was unconstitutional because it, "...attempts to regulate the environmental effects of matters largely within the control of the province."[228] The Court responded, however, that the environment was an, "...abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."[229] The Court reasoned that while some projects may fall primarily under provincial jurisdiction, federal participation is required if the project affects an area of federal jurisdiction as was the case with the Oldman dam.[230]

After addressing the above arguments, the Supreme Court upheld the lower court's ruling and instructed the Minister of Transport to conduct a review of the dam. Justice La Forest acknowledged that despite the late stage in the project, the Minister should nonetheless comply with EARP as it was possible that the assessment would uncover ways to mitigate any adverse impacts the dam may have on areas of federal responsibility.[231]

While the Supreme Court clarified the uncertainty that surrounded the statutory and constitutional validity of EARP, much uncertainty remained as to how the ruling

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[228] Ibid., 63.

[229] Ibid., 64.

[230] Ibid., 69.

[231] Ibid., 80.

would affect the Oldman dam itself. FOR was confident that the dam would be decommissioned[232] but others questioned the impact the ruling would have on a project that was 100% complete and operational.[233] Although the Supreme Court clearly stated that the federal government was required to comply with EARP, many questioned the force an EIA would have on a Minister's decision respecting the Oldman dam.

The impact of the Supreme Court ruling was felt immediately following the release of the EARP Panel report four months later. After reviewing studies and holding public hearings, the Panel concluded that the costs to the environment were far greater than the gains that would result from the dam. In particular, the Panel noted that damage to the fisheries, the loss of the cottonwood forests, and damage to other wildlife species were the chief environmental costs expected from the operation of the dam.[234] Based on these conclusions, the Panel recommended that the federal government decommission the dam by opening the low level diversion tunnels to allow the river to flow freely as this would sharply reduce the negative impact that the dam would have on the environment.[235] The Panel also recommended that while decommissioning the dam was preferred, should Ottawa decide against this action it ought to place stringent conditions

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[232] "Oldman appeal rejected, Court rules for environment" Edmonton Journal 24 Jan. 1992.

[233] "Court leaves puzzle unsolved" Edmonton Journal 29 Jan. 1992.

[234] FEARO, Oldman River Dam: Report of the Environmental Assessment Panel (Ottawa: Minister of Environment, 1992), 5.

[235] Ibid., 6.

on Alberta to mitigate environmental problems before an approval was granted.[236]

Immediately following the release of the report, Ottawa rejected the primary recommendation of its own assessment panel. The federal Transport and Environment ministers were satisfied that the concerns raised in the report could be mitigated and thus saw no need for decommissioning the dam.[237] But one year later, when Alberta had not implemented the mitigation measures recommended in the report, FOR returned to the Federal Court to attempt to force Ottawa to comply with the EARP Panel's recommendations.[238] The Society's efforts were in vain. When Justice Rothstein handed down his decision, he rejected the Society's request, for he found that EARP placed no legal duty on the federal government to implement the recommendations.[239] The fate of the dam finally became apparent when the federal government issued a licence to Alberta for the controversial project even though the province had not yet complied with all federal requirements. FOR vice-president Martha Kostuch's response to this action was far less enthusiastic than her reaction to the Supreme Court ruling 19 months earlier:

> "This is the culmination of our going all the way to the Supreme Court of Canada to force the federal government to do an environmental assessment. This has been a long, long battle and this is the result...It's disgusting."[240]

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[236] Ibid.

[237] "Ottawa won't shut Oldman dam" Edmonton Journal 22 May 1992.

[238] *Friends of the Oldman River Society v. Canada* (1993) 11 C.E.L.R. 196.

[239] ibid., 207.

[240] "Oldman dam receives licence" Calgary Herald 4 Sep. 1993.

D. Procedure vs. Substance: EARP and the National Parks Act

The Oldman case magnified the inherent limitations in the federal EARP process. Most notably, the non-binding nature of the Guidelines Order was called into question. Since an assessment panel has only advisory powers under EARP, initiating departments are not bound by law to comply with panel recommendations. Rather, EARP grants the minister of an initiating department the discretion to decide to what extent such recommendations will be adopted as policy prior to the approval of the project. While the Court did hold that EARP was a law of general application which was thus binding on all federal departments, the decision in the Oldman case neither considered nor challenged this inherent limitation.

As with NEPA in the U.S., EARP's limitations stem largely from its procedural requirements. The Guidelines Order merely directs federal departments to "consider" the impacts their proposed developments will have on the environment. But the decision to proceed with or halt a project is ultimately left in the hands of the minister of an initiating department. As FOR discovered after launching a legal action to force the federal Transport Minister to comply with panel recommendations, a minister's decision is not reviewable in the courts. The question that arises is would substantive provisions give federal environmental impact assessment more force? In order to see if this would be the case, an examination of judicial review of a statute with substantive provisions will follow.

The *Canadian Parks and Wilderness Society v. Wood Buffalo National Park et al* was the first case to test the limits of what development activities are permitted in the national parks.[241] At issue in this case was the renewal of a long term agreement in 1983 between the federal government and Canadian Forest Products ltd. (Canfor) to log a 470 square kilometre area of old growth white spruce in Wood Buffalo National Park. In December 1990, following pressure from environmentalists, federal Environment Minister Robert de Cotret promised to buy out the agreement in light of the environmental damage occurring from logging in the park.[242] By January 1992, when the federal government failed to act, the Canadian Parks and Wilderness Society (CPAWS) filed a legal action to challenge the validity of the agreement.[243]

The Society contended that the agreement violated section 4 of the National Parks Act (NPA) which protects Canada's national parks "...so as to leave them unimpaired for the enjoyment of future generations."[244] The plaintiffs argued that since the NPA required the federal government to hold national parks in trust for the people of Canada, the 1983 agreement was in direct conflict with the Act.[245] Ottawa defended the validity

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[241] (1992) 55 F.T.R. 286.

[242] Stewert Elgie, "Sierra Legal Defense Fund Challenges Logging in National Park" Environmental Law Centre News Brief v.7(1) (192), 12.

[243] Ibid.

[244] R.S. c. N-13 s. 4.

[245] Elgie, 12.

of the agreement, arguing that it was not in violation of the Act and denying that the agreement was in breach of trust.[246]

Five months later, however, the federal government executed an about-face and sided with the arguments made by the CPAWS.[247] After reviewing the 1983 agreement and the related legislation, Environment Canada declared Canfor's licence invalid. The federal government admitted that the pending legal action accelerated decision-making in this case. Ottawa subsequently filed a joint application with the CPAWS agreeing to the terms that both parties wanted the Federal Court to consider at the hearing.[248]

When the application was heard on June 8, 1992, Justice Mackay approved the agreement made between Ottawa and the Society. Specifically, the Court acknowledged that the Environment Minister was not authorized to enter into agreements which disposed of natural resources found on public lands. Justice Mackay further added that the only authority given to the federal government under the NPA to authorize the sale, lease, or other disposal of public lands within a park was either for right of ways[249] or for setting apart lands for national historic parks.[250] Since the Canfor agreement clearly did not fall under either of these provisions, the Court revoked the licence.[251]

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[246] *CPAWS v. Wood Buffalo National Park*, 289.

[247] "Lawsuit sped up Ottawa's reversal on Wood Buffalo, parks official says" Edmonton Journal 22 May 1992.

[248] Ibid.

[249] R.S. c. N-13 s. 6(2).

[250] Ibid., s. 9.

[251] *CPAWS v. Wood Buffalo National Park*, 292.

At face value, *Wood Buffalo* appeared to be an important legal victory to the extent that commercial logging stopped in the park. Arguably, it is unlikely that judicial enforcement of EARP's procedural requirements would have achieved a similar result. When taken out of the context of this case, however, it may be difficult to argue that judicial review of the applicability of the NPA's substantive provisions to other cases would necessarily be reaffirmed. The reason why this may be the case is that certain circumstances existed in *Wood Buffalo* that may not be present in other legal challenges.

For example, at approximately the same time that the CPAWS initiated its legal action, commercial logging in the park also received international attention from the United Nations committee responsible for monitoring World Heritage sites (the park was granted this status in 1983). Recognizing the environmental degradation that resulted from this activity, the International Union on the Conservation of Nature called on Ottawa to rectify the damage.[252] These international pressures may have been the driving force behind Ottawa's decision to file a joint application with the CPAWS.

The presence of an international watchdog, however, may not necessarily lead to preventing economic activity in other national parks accorded the same status. For example, although Canada's Rocky Mountain parks have attained World Heritage status, commercial development in Banff and Jasper continues despite overwhelming opposition to the practice. When comparing Wood Buffalo to these parks, it is apparent that other conditions must be present before substantive provisions will have a more profound

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[252] "U.N. body sounds alarm on Wood Buffalo Park" Edmonton Journal 18 Mar. 1992.

impact on policy outcomes. It would seem that the perceptions or attitudes of judges in addition to the ideological outlook of the courts may also be key. For example, a judge may find it easier to allow a substantive victory in an isolated area than in an area that is a popular tourist attraction with many economic interests. Thus, the Wood Buffalo decision while significant in and of itself, may be something of an anomaly. The true test to judicial review of the NPA's substantive provisions may lie in challenges to economic activity in national parks like Banff and Jasper.

E. Conclusion

When the Supreme Court handed down its ruling on the Oldman dam, environmentalists called it the most significant environmental law decision in Canadian history.[253] And, when one considers whether the Society achieved all that it could given the legislation and regulations in place at the time, one would probably conclude that the accomplishments were indeed significant. Most notably, FOR, through litigation, succeeded in convincing the Supreme Court that Ottawa had a responsibility to conduct an EIA of the Oldman dam. It is thus fair to suggest, in light of Ottawa's initial reluctance to comply with EARP prior to FOR's legal actions, had the Society not pursued their policy battle in court it is unlikely a federal review would have been performed.

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[253] "Reaction to Oldman ruling" Edmonton Journal 24 Jan. 1992.

The Oldman case also played a vital role in redefining and clarifying federal environmental assessment for EARP was interpreted to have the force of administrative law. Prior to the Oldman ruling, federal department compliance with the Guidelines Order was sporadic at best -- FEARO conducted an average of only three panel reviews a year. Following the Federal Court of Appeal decision, after Ottawa realized the mandatory nature of EARP, that number increased to twenty.[254]

While the Oldman decision had a significant impact on environmental assessment in Canada, an evaluation of its impact on advancing FOR's policy goals suggests that the ruling was less than successful. In summarizing FOR's success with litigation, it is fair to suggest that the Society won the battle but lost the war. Specifically, the Society's legal battle failed to stop either the construction or the operation of the dam. The explanation behind this less than favourable outcome lies in the inherent procedural limitations of the Guidelines Order. The Oldman conflict revealed that judicial review of the process FOR had relied upon to stop the dam also subsequently led to the approval of the project primarily due to the absence of substantive provisions in EARP. *Wood Buffalo*, however, demonstrates that more conditions must be met in order for substantive provisions to have a greater impact on policy outcomes. These conditions include the attitudes of jurists and the ideological outlook of the courts.

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[254] House of Commons, Legislative Committee C on Bill C-13: An Act to Establish a Federal Environmental Assessment Process (Ottawa: Queen's Printer, 1991), 2:5.

IV. THE OLDMAN RIVER CASE AND THE EVOLUTION OF ENVIRONMENTAL ASSESSMENT LEGISLATION

> "A mistake a lot of people make when they go to court is that all they're thinking of doing is winning. They want to stop the development or pollution or what have you, so they miss some of the other things that going to court can do: clarification of a law, or identifying problems in existing laws, or identifying areas that need reform and finding the way to get it."[255]

At this stage in the Oldman controversy, the status of the dam has been largely resolved in both the legislative and judicial branches of government. Arguably, the operation of the dam serves as a reminder of the limitations of EIA litigation. Was all of FOR's work for nothing? On the contrary, the litigation surrounding the Oldman may have achieved broader objectives than the Society initially anticipated. In fact, in addition to clarifying the federal environmental assessment process and identifying the inherent problems with EARP, it may be argued that the Oldman case was an important catalyst in changing the face of Canada's environmental assessment legislation.

Former federal Environment Minister Jean Charest asserted that the development of new EIA legislation in Canada coincided with the release of two reports in 1987 which considered sustainable development.[256] The reports of the World Commission on

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[255] Professor Linda Duncan as quoted in Jim Wilson, "Taking the Environment to Court" Environment Views March/April 1984, 23.

[256] Canada, House of Commons, Legislative Committee C on Bill C-13: An Act to Estabish a Federal Environmental Assessment Process Proceedings (Ottawa: Queen's Printer, 1991), 2:5.

Environment and Development and the Canadian National Task Force on Environment and Economy focused attention on the urgency and importance of achieving sustainable development while protecting the environment. The reports, recognizing that uncontrolled economic development severely threatened the environment, called for improved environmental assessment procedures to be mandatory and entrenched in law.[257] According to Charest, these reports formed the basis for environmental assessment reform in Canada.[258]

Charest's comments suggest that the federal government was aware of the necessity of EIA reform well before the Federal Court of Appeal delivered its decision on the Oldman dam. But during legislative committee hearings for the proposed Canadian Environmental Assessment Act, the former minister acknowledged that the ruling had an impact on Ottawa's decision to table Bill C-13 in Parliament in June 1990. On two separate appearances before the Committee, Charest's comments implied that the bill was something of a reaction to the Federal Court decision:

> "Bill C-13 may be one of the most important pieces of legislation ever to be tabled before Parliament. It is, I would suggest, one of the most needed, especially taking into account recent court cases that have arisen."[259]

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[257] Alberta Environment, Background Paper Nine: Environmental Impact Assessment (Edmonton: Alberta Environment, 1991), 7.

[258] House of Commons, Legislative Committee C on Bill C-13, 2:5.

[259] Ibid., 1:23.

> "The net effect of these court decisions has been to create an environmental assessment review process which is uncertain. The faulty foundations of the current system must be replaced.[260]

The Committee also heard from witnesses that the pending Supreme Court ruling on the Oldman would be important for re-defining and clarifying the proposed legislation. Charest also indicated that the decision would guide the federal government's deliberation on Bill C-13 and would undoubtedly have a significant impact on the Committee's work. He also recommended a break in Committee proceedings when the Court handed down its decision in order to analyze its contents and reflect it in the proposed legislation.[261]

Thus, while the federal government may have recognized the need for environmental assessment reform prior to the Oldman litigation, the former Minister's comments above suggest that there was an obvious link between FOR's legal actions and Ottawa's enactment of the Canadian Environmental Assessment Act.[262] Evaluating whether the Act goes far enough to rectify the fundamental flaws in EARP that were identified in the Oldman case is the objective of this final chapter. The chapter will discuss the improvements made to EIA under the new Act, evaluate its provisions to ascertain whether it addresses the inherent limitations of EARP, and consider what the Act promises for the next generation of EIA litigation.

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[260] Ibid., 2:5.

[261] Ibid., 2:6.

[262] S.C. 40-41, Eliz. II, c. 37.

A. Improving Environmental Impact Assessment in Canada

The Canadian Environmental Assessment Act (CEAA) was assented to on 23 June 1992 and came into force during the spring of 1993. While reviewing the new legislation, it immediately becomes apparent that several of the provisions found in EARP have been maintained. For example, the Act's initial screening and panel review stages are similar to EARP's two-stage assessment process. What the Act tries to do, however, is address the uncertainties in the Guidelines Order which subsequently led to the increase in EIA litigation.

The CEAA removes some discretionary power from the responsible authority at the screening stage of the process. For example, under EARP, the initiating department was responsible for developing lists that identified the types of proposals which were either automatically excluded from or automatically referred to the public review stage.[263] The new Act takes this decision-making power away from the responsible authority. Instead, the Act states which projects are excluded or mandatory.[264] Thus, while the responsible authority still conducts the initial screening of all proposals, its control over developing lists to determine which projects are excluded from process have been eliminated.

The new Act also clarifies when the EIA process must take effect by stating that environmental reviews should be undertaken as early as is practical in the planning

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[263] Ibid., s. 11(a)-(b).

[264] Ibid., s. 7; s. 21.

process.[265] The purpose of this section is to ensure that a review panel examines as many concerns as possible before the department has made certain commitments to a particular proposal. The Act goes one step further and states that projects may not be approved and carried out until the necessary review has been conducted and appropriate mitigation measures have been taken.[266] This language is stronger than EARP and suggests a commitment on the part of the federal government to consider environmental issues prior to approving major developments.

Not only does the CEAA specify when reviews should be undertaken, it also provides more comprehensive provisions than EARP regarding the type of information to be included in screening and panel reports. Section 16(1) of the Act requires review panels to consider the following factors: the environmental effects of the project; the significance of those effects; comments from the public respecting the project; measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and the need for the project, including other alternatives. The panel must also consider the project's purpose and the supply of renewable resources that are likely to be significantly affected by the project.[267]

There are also more provisions for public participation in the new Act compared to EARP where public input played only a limited role in the assessment process. At the outset, the CEAA states that one of the purposes of the Act is to "...ensure that there be

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[265] Ibid., s. 11(1).

[266] Ibid., s. 20(1)(a); s. 37(1)(a).

[267] Ibid., s. 16(2).

an opportunity for public participation in the environmental assessment process..."[268] One way that the new Act achieves this is by considering comments from the public at the mediation or assessment stage.[269] Under EARP, public involvement was limited to the public review stage which had the effect of preventing outsiders from making any meaningful contributions to environmental policy-making early in the process. The Act also ensures that after a screening report has been prepared, the responsible authority considers whether public concern warrants a reference to a mediator or a review panel. If so, the responsible authority refers the project to the Minister for a referral to a mediator or a review panel.[270] In addition, the public can make comments about or address concerns in comprehensive study reports[271] and section 55 provides for more access to information to the public through a public registry established under the Act.

Unlike the Guidelines Order, the Act provides for some judicial review of proponent activity. Section 51(1) states that, upon the application of the Attorney-General of Canada, if a court believes that a proponent will ignore an order to refrain from carrying out an activity until after an assessment is completed, the court may issue an injunction until the Minister is satisfied that the proponent has complied with the EIA process.[272] This particular section was likely drafted in light of the litigation that resulted from the

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[268] Ibid., s. 4(d).

[269] Ibid., s. 16(1)(c).

[270] Ibid., s. 20(1)(c)(iii); s. 23(b)(iii); s. 25(b).

[271] Ibid., s. 22(2).

[272] Ibid., s. 50.

Oldman and Rafferty-Alameda cases and reinforces the federal government's commitment to comply with the EIA process before a project is approved.

The CEAA also establishes the Canadian Environmental Assessment Agency to administer the legislation. The Agency's additional duties include advising and assisting the Environment Minister in performing his duties and obligations under the Act, promoting uniform application of the assessment process among all federal authorities, conducting research on matters respecting environmental assessment, and ensuring the opportunity for public participation in the process.[273] This agency is similar in structure to the U.S. Council on Environmental Quality established under NEPA to advise and assist the President.

The new Act clarifies and improves many of the procedural ambiguities that were characteristic in the former Guidelines Order. Decision-making power respecting the development of exclusion and mandatory lists has changed. The Act also more clearly states when EIA's should be performed and what information must be included in the reports. More opportunities for public participation are also included and the Act provides for some form of judicial review to enforce compliance with the assessment process.

B. The CEAA and the Flaws in Canada's EIA Process

While the new Act makes improvements to Canada's EIA process, one must consider whether it goes so far as to rectify the fundamental flaws of EARP identified by the Oldman litigation. In order to acheive this task, the legislation would have to do the

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[273] Ibid., s. 61; s. 62.

following: be broad enough to subject all proposals affecting areas of federal responsibility to the EIA process; reduce ministerial discretion; bind ministers and responsible authorities to comply with review panel recommendations; and include public participation provisions to adequately enforce compliance with the EIA process. An examination of the CEAA follows to ascertain whether it meets these requirements.

Compared to EARP, the CEAA is far narrower in its scope of application and this limitation is revealed almost immediately in the first few sections of the Act. At the outset, the Act lists the types of proposals to be subject to a federal review. Section 5 limits federal involvement in the EIA process to either those projects proposed by a federal authority or those involving federal expenditures, the transfer of an interest in federal lands, or the exercise of such powers by federal authorities as prescribed by the legislation. This section is narrower than the Supreme Court interpretation of EARP in the Oldman River dam case which subjected all projects to an EIA, including provincial undertakings, that affected an area of federal responsibility. Elder suggests that "...it is not certain that even such a large project as the Oldman dam would have to be assessed at all..." under the new legislation.[274]

While the CEAA removes some decision-making powers from responsible authorities like those found in EARP, it continues to allow for too much ministerial discretion. For example, the legislation does not specify the types or sizes of projects or

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[274] P.S. Elder, "One More Look at the Oldman Dam" Resources: The Newsletter of the Canadian Institute of Resources Law No. 39 (Summer 1992), 8.

magnitudes of impacts which will trigger compulsory assessment.[275] Rather, such decisions are left entirely to the Environment Minister as he is given authority under the Act to establish his own guidelines for reaching these conclusions. Thus, self-assessment remains a key principle in the new legislation.

Ministerial discretion is also extended to agreements with other levels of government. Provisions in the new Act to allow the Minister to establish joint panels with other jurisdictions[276] suggest that governments may be able to by-pass the actual assessment process outlined in the Act. The Minister may also make similar agreements with other federal authorities if he is satisfied that an appropriate substitute to the environmental assessment by a review panel has been used in its place.[277] Regarding transboundary and related environmental effects, a project may not be referred to a review panel or mediator where the Minister and governments of all interested parties have agreed on another manner of conducting an assessment.[278] These sections indicate that while the Minister is subject to certain standards in other parts of the assessment process, there is room for manoeuvre in these circumstances which allow the Minister to exercise a great deal of discretion in many areas of the Act.

The new legislation also neglects to remove the non-binding nature of panel recommendations first established under EARP. For example, upon the completion of a

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[275] Ibid.

[276] S.C. 40-41 eliz. II, c. 37, s. 42.

[277] Ibid., s. 43.

[278] Ibid., s. 46(2).

panel review, recommendations are submitted to either the responsible authority or the Environment Minister. The responsible authority is subsequently required to act on the report by deciding to either proceed with or reject a proposal. If a decision is made to go ahead with a proposal, despite the presence of adverse environmental impacts, the responsible authority has a statutory obligation to design and implement a follow-up program and advise the public of mitigation measures taken.[279] Arguably, this new requirement offers more than EARP but it is important to point out that the responsible authority decides to a great extent which measures will be taken, for all that is required of the authority in the Act is to implement mitigation measures that it alone considers appropriate.[280] Thus like EARP, the CEAA utilizes EIA primarily as an information gathering and recommending tool. It contains no provisions that would force the Environment Minister or responsible authorities to comply with the findings of panel reports.

Other weaknesses in the Act may further hinder adequate compliance with the environmental assessment process. For example, while the legislation includes public participation provisions that were virtually absent in EARP, they may not be forceful enough to allow for the public input necessary to effectively influence decision-making in the assessment process. The recurrent "in the opinion of" phrases found throughout the Act respecting public participation demonstrate this limitation. For example, section 18(3) states that the public will be given the opportunity to participate in the screening

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[279] Ibid., s. 38.

[280] Ibid., s. 37(1)(a).

process "...where the responsible authority is of the opinion that public participation is ... appropriate." In addition, section 25(b) states that, "if a responsible authority is of the opinion that public concerns warrant a reference to a mediator or a review panel, the responsible authority may request the Minister to refer the project to a mediator or review panel." So while at first glance it may appear as though the doors have been opened to more public involvement, the extent of this participation is largely decided by the Environment Minister or responsible authority.

The above examination reveals that the CEAA falls short in addressing the inherent limitations of Canada's EIA process. The Act narrows the scope of EIA to the extent that several projects that would have been subjected to the Guidelines Order may escape public review under the new regime. The Minister and responsible authority maintain a considerable degree of discretion. Environmental assessment continues to be largely regarded as an information gathering tool and is thus not binding on a Minister's decision respecting a proposal. Finally, weak public participation provisions may prevent the Act from being adequately enforced.

C. The CEAA and the Next Generation of EIA Litigation

The examination above has focused on assessing the strengths and weaknesses of the CEAA. The purpose of this section is to consider what this legislation promises for the next generation of EIA litigation. In order to accomplish this task, the CEAA will be compared with NEPA to help draw some conclusions about the boundaries of

effectiveness of environmental assessment litigation. Three areas will be considered: the EIA process, public participation, and the discretionary nature of decision-making.

The CEAA and NEPA have similar EIA processes to the extent that both statutes are primarily self-assessment regimes. This indicates that the department responsible for an initiative is also, for the most part, responsible for conducting the EIA. For example, under the CEAA, the responsible authority prepares both the initial screening report and the EIA for the public review stage. Similarly, under NEPA, an agency responsible for an undertaking prepares an EIS in accordance with guidelines developed by the CEQ. But the process does not permit the agency to decide whether or not to prepare an EIS. Agencies that attempt to either by-pass or ignore this part of the process have been challenged in the courts and have lost. The courts have ruled in this manner based on NEPA's requirement to subject all major undertakings affecting the quality of the human environment to the EIS process.

It may be argued that cases challenging Canadian federal departmental decisions to by-pass the EIA process will achieve similar results with a few exceptions. In the Oldman case, the Supreme Court ruled that EARP was mandatory and thus had to be applied to all projects affecting areas of federal responsibility. The new CEAA reflects the mandatory nature of the process but limits its applicability to only federal authorities, excluding provincial proposals, and further includes a list that excludes certain projects from the process. Thus, it is likely that cases challenging a department's decision not to prepare the initial screening report will succeed only if the proposal in question is within the purview of a federal authority or does not fall under the Act's exclusion list.

Both NEPA and the CEAA contain similar public participation clauses that allow interested parties to comment on initial assessment reports and gain access to information respecting EIA's for particular projects. Both statutes also ensure that the public is informed about assessment hearings as well as receives notice regarding the decisions made by the initiating department upon the completion of the assessment. But the differences between the two regimes is that where NEPA ensures that citizens have a right to public involvement, the extent of effective public participation under the CEAA is largely determined by either the responsible authority or the Environment Minister. For example, upon the completion of the initial screening report, a project may be subject to a public review if either the responsible authority or Minister is of the opinion that public concerns warrant such a referral. The challenge that may arise is in convincing the appropriate persons that public concern is indeed sufficient to signal a public review. As discussed above, NEPA's assessment requires that EIS's be prepared for all proposals and an agency's failure to do so is reviewable in the courts. But under the CEAA, the discretionary language may prevent interested parties from successfully challenging decisions not to proceed to the public review stage in the courts.

Upon the completion of an assessment, both NEPA and the CEAA give the initiating department the authority to decide whether or not to proceed with or reject a proposal. While it is expected to consider recommendations that come from the environmental assessment, neither Act requires that department to implement those recommendations. While both statutes require the proponent to advise the public of its course of action respecting a project, the responsible authority considers the extent to

which any mitigation measures will be adapted. In the U.S., this discretion has been challenged frequently in the courts and thus far has ended with the same result. While courts have ordered compliance with NEPA's procedural requirements, they have consistently rejected legal challenges that question the decision-making authority of the implementing agency. NEPA is not a decision rule and thus the courts cannot order an agency to reject a proposal or order that mitigation measures be taken.

In Canada, the Court delivered virtually the same decision with respect to the Oldman dam when FOR challenged Ottawa for failing to adapt the EARP panel recommendations. The Federal Court dismissed the action because it was unable to find an obligation in EARP to comply with the panel recommendations. The discretion of the initiating department continues to be very much a part of the CEAA. Thus, it is likely that litigation challenging a department's decision-making authority will end in the same outcome.

Some would question why the federal government bothered to introduce the CEAA at all, especially in light of the fact that politicians were able to achieve their policy objectives under the former EIA process -- the procedural nature of judicial decisions under EARP did not prevent decision-makers from proceeding with proposed developments. One possible explanation is that Ottawa wanted to exercise a greater degree of control over the extent to which the judiciary would play a role in reviewing environmental assessment policy. By doing this, the federal government may have hoped to eliminate the uncertainty surrounding legal challenges to proposed developments. As the Oldman case demonstrates, litigation may be dangerous for government. Regardless

of whether government wins, negative publicity resulting from a legal action may have a negative impact on political support. Therefore, an act that maintains broad discretion and limits the role of the judiciary may help to alleviate such negative publicity.

It is difficult to predict the volume of litigation that is likely to result under the CEAA as this will largely depend on how the public perceives the federal government's use of the Act. But based on the evaluation above, it is possible to predict how the judiciary may respond to the legal challenges. Given the discretionary powers granted to the decision-making authority, the outcomes of EIA litigation under the CEAA are likely to be similar to those under EARP. Without substantive clauses, the courts are limited to ruling only on procedural requirements and judges may not substitute their opinions for those of an agency. These are the boundaries of effectiveness of EIA litigation. Thus, it may be argued that the CEAA limits the impact that judicial review is likely to have on influencing environmental policy.

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